(17,738.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1900.

No. 265.

THE STATE OF IOWA, PLAINTIFF IN ERROR,

vs.

EDWIN O. ROOD, CHARLES W. ROOD, GEORGE A. WALLACE, EMILY J. WALLACE, GEORGE S. WALLACE, AND MRS. GEORGE S. WALLACE.

IN ERROR TO THE SUPREME COURT OF THE STATE OF IOWA.

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a Pleas before the supreme court of Iowa in a cause between Edwin O. Rood and Charles W. Rood, plaintiffs, and George A. Wallace, Emily J. Wallace, George S. Wallace, and Mrs. George S. Wallace, defendants, and The State of Iowa, intervenor.

Be it remembered that on the 30th day of September, 1897, there was filed in the office of the clerk of the supreme court of Iowa, by The State of Iowa, intervenor, appellant, a printed abstract of the record, the same being in the words and figures following, to wit:

1 In the Supreme Court of Iowa, October Term, A. D. 1897.

EDWIN O. ROOD and CHAS. W. ROOD, Appellees,
vs.
GEORGE A. WALLACE, EMILY J. WALLACE, GEORGE S. WALLACE, and Mrs. George S. Wallace, Appellees; State of Iowa, Intervenor, Appellant.

2 EDWIN O. ROOD and CHAS. W. ROOD, Appellees,
vs.
JAMES O'CONNELL and MRS. JAMES O'CONNELL, Appellees; STATE of Iowa, Intervenor, Appellant.

Appealed from the district court of Humboldt county—Hon. Lot Thomas, judge.

R. M. Wright, Botsford, Healy & Healy, J. P. Dolliver, and M. D. O'Connel, attorneys for plaintiffs.

S. W. White, J. E. Mershon, Prouty, Coyle & Coyle, attorneys for defendants.

Milton Remley and W. L. Smith, attorneys for intervenor.

Appellant's Abstract of Record.

Inasmuch as the pleadings in the above-entitled cases are practically identical with the exception of the seventh paragraph of plaintiffs' petition which contains a description of the land in controversy in each case, it will be necessary to set out one set of pleadings only, and the seventh paragraph of the petition in the other cases.

3 In the case of Edwin O. Rood *vs.* George A. Wallace *et al.*, on the 25th day of January, 1895, plaintiffs filed in the office of the clerk of the district court of Humboldt county the following:

Petition in Equity.

The plaintiff states:

Par. 1. That the land hereinafter described was conveyed to the State of Iowa by the United States of America under and by virtue of the act of Congress of the United States approved on September 28th, 1850, and known as the swamp-land act.

Par. 2. That said land inured to the benefit of Humboldt county, Iowa, under the act of the legislature of the State of Iowa, approved January 13th, 1853, which took effect February 2nd, 1853, and is known as chapter 13 of the Laws of the Fourth General Assembly of Iowa, and an act of the legislature of the State of Iowa approved January 25th, 1855, and which took effect February 21, 1855, and is known as chapter 110 of the Laws of the Fifth General Assembly of Iowa.

Par. 3. That said land, with other land, on the 8th day of January, 1879, was, by contract in writing, between said county of Humboldt and the Fort Dodge and Fort Ridgely Railroad Company, a corporation duly organized and doing business under the laws of the State of Iowa, sold and disposed of to said Fort Dodge and Fort Ridgely Railroad Company by said county, a copy of which contract is hereto attached marked Exhibit A and made a part of this petition.

Par. 4. That hereafter and in pursuance of said contract and on the 1st day of September, A. D. 1884, the said Humboldt county transferred to said railroad company all its right, title and interest in said land, a copy of which deed is hereto attached marked Exhibit B and made a part hereof.

4 Par. 5. That on the 15th day of December, A. D. 1884, the said railroad company conveyed by deed in writing to one A. McBane, all its right, title and interest in the said land, a copy of which deed is hereto attached marked Exhibit C and made a part of this petition.

Par. 6. That thereafter and on the 19th day of December, A. D. 1884, the said A. McBane conveyed by deed in writing to one George R. Pea-sons, the said land, a copy of which deed is hereto attached marked Exhibit D and made a part hereof.

Par. 7. That thereafter and on the — day of ——, 1892, the said George R. Pearsons by deed in writing conveyed the said land to the plaintiffs in this suit which said land was conveyed by said Pearsons to these plaintiffs and which said land these plaintiffs are the owners of, and which said land is described as follows, to wit:

The unsurveyed portions of sections twenty-one and twenty-two in township ninety-two, north of range twenty-seven west of the fifth P. M., the same being the north part of Owl lake so called lying within the bounds of the sections named above and enclosed by wire fence except on south side, also a part of Owl lake so called bounded as follows, to wit:

Commencing on the southeast corner of section 21 in township 92 north of range 27, west of the fifth P. M., thence east 186 rods, thence south 5¾ degrees west, variation 9½ degrees, 254 rods to the main ditch now built in so-called Owl lake, thence following the main ditch in a northwest direction to the section line between sections 27 and 28 in said township and range, thence north 30 chains and 80 links to the place of beginning and this being part of the lands conveyed by Humboldt county to the Fort Dodge and Fort Ridgely Railroad Company as shown by paragraph 3 hereof.

5 Par. 8. That on September 28th, 1850, when the said swamp-land act referred to in paragraph 1 hereof became a law the said lands described in paragraph 7 hereof were in fact swamp and overflowed lands within the meaning of said act of Congress, and said land was at that time and continuously until said Pearsons received the title to said land, as set out in paragraph 6 hereof entirely unfit for cultivation without artificial drainage by reason of the same being wet, swampy, marshy and largely grown up to rank grass, reeds and rushes and overflowed with water.

Par. 9. That in 1884 the said Pearsons by means of ditches made by him commenced to drain and reclaim said land and in said ditching spent a large amount of money, to wit: $— and by said ditching then made a large part of said lands suitable and valuable for pasturage and in year 1885 the said Pearsons built a post and barb-wire fence around said land and the balance of the land constituting the so-called Owl lake and in the said year and for several years thereafter occupied and used said lands for pasturage and in the years 1891 and 1892 the said Pea-sons and the plaintiffs herein expended a large amount of money in making ditches through said tract of land and in making a large ditch for an outlet for the water on said tract of land and thereby in said year 1892 all of said land was perfectly drained and reclaimed and made fit for cultivation and the raising thereon of all and every kind of grain and crops produced in said part of the State of Iowa.

Par. 10. That in the years 1893 and 1894 these plaintiffs plowed about 250 acres of land so conveyed to them by the said Pearsons and in the year 1894 about 175 acres were in crop and all of said land is in suitable condition to be plowed and cropped in grain; that 18 acres of said land is now sown to fall rye and about 60 acres of said land is fall-plowed and ready for seeding and the balance of said land (about 250 acres) is in cornstalks and tame grass and in 1895 we intend to crop 300 acres of said land in grain and

6 the balance of said land (about 200 acres) will be used by us in 1895 for meadow and pasture, and these plaintiffs are now in the actual possession and occupation and use of all of said land and the same is enclosed by fence except on the south side between this tract and land owned by said Pearsons, where said ditch forms the boundary.

Par. 11. That all of the above improvements including the said ditching and fencing were made in good faith and the occupation of these plaintiffs and their said grantor, Pearsons, was for the purpose of actual and permanent occupation, and improvement of the said several portions of said land, and the aggregate cost of the said improvements, including said ditching and fencing, was about $7,000. That in said ditching these plaintiffs have expended in the last two years the sum of about $1,000, and in addition to said ditching and fencing these plaintiffs have and own upon said tract of land other improvements worth not less than $700.

Par. 12. And plaintiffs further state that said defendants and each of them, for the purpose and with the intent to interfere with plaintiffs' possession, occupancy and use of said lands and premises,

are entering upon said land and premises and threaten to enter upon and take possession of the same and to occupy, work, crop and farm the same and said defendants have already erected a cabin on said land and threaten and intend to put in a crop on the land which plaintiffs have fall-plowed as hereinbefore mentioned, and to erect other and permanent improvements on said lands and to interfere with and prevent the plaintiffs in the use and enjoyment of their said lands and in the cultivation and use of said lands, and plaintiffs aver that unless restrained the said defendants will carry out their said threats. That said defendants are insolvent and if said threats are carried out these plaintiffs will be irreparably damaged and remediless.

Par. 13. Plaintiffs are now having said land surveyed and platted (said tract having been originally meandered) and they are
7 taking the necessary steps to have the said lands patented by the United States of America to the State of Iowa, and by the State of Iowa to Humboldt county, Iowa.

Wherefore, the plaintiffs pray that the said defendants and each of them, their servants, agents and employés be forever restrained and enjoined from occupying or taking possession of or trespassing upon any portion or part of said real estate and further using or cultivating or attempting to use, plow, harrow, seed or in any other manner cultivate any part or portion thereof, and from using or taking possession of the improvements thereon and from using or taking possession of any portion or part of the improvements thereon and from in any manner interfering with or interrupting the said plaintiffs in their use and enjoyment of said premises and the improvements thereon, and that defendants be further restrained and enjoined from erecting any buildings or improvements on said lands or any part thereof, and also that a temporary writ of injunction issue in said cause, and that on the final hearing of this cause said temporary injunction be made perpetual and that plaintiffs may have such other and further relief as may be equitable in the premises and the costs of this action.

Duly verified.

Exhibit A.

Exhibit A is a contract made by and between the board of supervisors of Humboldt county, in behalf of the county, and the Ft. Dodge & Ft. Ridgely Railroad Company on the 8th day of January, 1879, whereby Humboldt county agreed to convey to said railroad, all swamp lands within said county which had been, or should afterwards be patented to said county, except such swamp lands as had previously been disposed of, and the proceeds from the sale of swamp lands in consideration of the building of said railway and the operating of the same through certain localities in Humboldt county, subject to the ratification of the electors of said county.

8 Exhibit A further recites that in accordance with said contract, the said contract having been ratified by the electors of said county, certain portions of the swamp lands of Humboldt county were transferred to the Ft. Dodge and Ft. Ridgely Railroad Company,

the conveyance being by the instrument of which Exhibit A purports to be a copy, on the 3rd day of September, 1879; said document was filed for record the same day. The contract by and between the supervisors of said county and the railroad company is as follows:

This agreement made and entered into this eighth day of January, A. D. 1879, by and between the county of Humboldt, in the State of Iowa, represented by the board of supervisors of said county, party of the first part, and the Ft. Dodge and Ft. Ridgely Railroad Company, a corporation organized and doing business under the laws of the State of Iowa, party of the second part: Witnesseth,

First. That the said county of Humboldt for the purpose of making a railroad through the said county commencing at the present terminus of the line of the Ft. Dodge and Ft. Ridgely Railroad Company in section number thirty-three (33), township No. (91) ninety-one, north of range No. twenty-eight (28), west of the 5th P. M., Iowa in said county, and thence northwardly, to a point in said county hereinafter more fully described, has this day bargained and agreed to and with the party of the second part to appropriate and devote to the above-named party of the second part, all the swamp lands now belonging to the said county, and not heretofore conveyed or reserved to settlers in the said county of Humboldt together with all the proceeds of the said swamp lands and all the swamp indemnity lands, swamp land, scrip and money to which the said party of the first part is entitled or may hereafter become entitled under the laws of the United States or the State of Iowa, and also all swamp lands which may hereafter be patented to the said county of Humboldt, said swamp and swamp indemnity land and scrip as aforesaid, to be conveyed by deed

9 and delivered to the said party of the second part or any person that they may designate upon the following terms and conditions, to wit: The said party of the second part shall on or before September 1st, 1879, build its road (a medium gauge, its present gauge,) to and locate and maintain its depot upon a point on the township line, between the villages of Humboldt and Dakota, not more than forty-five rods north or south of Summer avenue, in the village of Humboldt and Mill street in the village of Dakota, and when the road is so completed, one-half (½) of all said swamp lands and one-half of the proceeds thereof including swamp indemnity lands, swamp lands, scrip and money, to which the said party of the first part, is entitled or may hereafter become entitled under the laws of the United States or of the State of Iowa, together with one-half of all the swamp lands which may hereafter be patented to the said Humboldt county, shall be conveyed by deed, and delivered to the said party of the second part, or to any person to whom the said party of the second part, may designate, the selection of one-half of the lands (as nearly one-half in value as may be) and the proceeds thereof to be made by the chairman of the board of supervisors, or such person as the board may select and by an officer of the said

company to be selected by the said company, and if they are unable to agree they shall select a third disinterested party who shall select from the said lands and the proceeds thereof the undivided half, to be there conveyed and delivered as aforesaid and his selection shall be as binding upon the parties, as if the parties hereto had each severally agreed thereto in this contract, by a separate description herein.

The said party of the second part, shall on or before December 15th, 1879, build its road to a point north of and not less than two miles distant from the township line, between township Nos. 92 and 93 and not more than one mile east or west of the range line,
10 between ranges 28 and 29 in said county, and when so built, the remainder of said swamp lands and the proceeds thereof together with the indemnity lands, swamp lands, scrip and money to which the said party of the first part is entitled or may hereafter become entitled under the laws of the United States or the State of Iowa, and all swamp lands which may be hereafter patented to the said Humboldt county, shall be conveyed by deed and delivered to the said party of the second part. It is also further agreed that whenever the said second party shall extend its road north of this last-named point, it shall locate and build a depot within (80) eighty rods north or south of a point on the said line of road west of the new bridge now constructed across the east fork of the Des Moines river in Humboldt township. This contract is further subject to the rights of settlers now holding contracts of purchase from the said county, but the said party of the second part shall be entitled to any balance due on the said contracts at the time of the taking of the vote, herein provided for, the evidence of the completion of the road to the first-named depot shall be the commencement of the running of trains over the said road, to the said depot by the said party of the second part and the evidence of the completion of the road to the second-named place, shall be the commencement of the running of trains regularly over the said road to the point by the said party of the second part. It is further expressly agreed, between the parties hereto, that said lands and the proceeds thereof above fully described, shall be taken by the said railroad company, subject to the provisions of section 988 of revision of 1860 and to the amendments to section 986 of said revision of 1860, by chapter 77 of an act taking effect in 1862, entitled: An act amending sec. 986 of the revision of 1860, in relation to swamp lands, and the party of the second part shall take the said lands and the proceeds thereof as above described subject to all the provisions of the acts of Congress of September 28th, 1850, and shall expressly release the State of Iowa, and the county of Humboldt from all liability
11 for reclaiming the said lands, but this said contract shall not be construed to release the said county from any obligations between it and the State of Iowa, or between the State of Iowa and the General Government, to do any acts contemplated by these acts of Congress, or the act of the General Assembly of Iowa passed January 13th, 1853.

It is further agreed between the parties hereto, that upon the rati-

fication of this contract by a majority of the legal voters of the said county of Humboldt, at a special election, called for the purpose, and the voting of a five per cent. tax in aid of the said railroad company, upon the taxable property in at least eight townships in said county, for the year 1879, or in so many townships, as the said railroad company shall accept for the vote of such aid in eight townships, then, and in that case, the said railroad company shall within sixty days of such ratification and completion of the vote as aforesaid, file its acceptance of the said contract and the said railroad company expressly reserve the right in case the said five per per cent. tax aid be voted in less than eight townships to accept the aid given, which election to accept shall be evidenced by written notice of such acceptance filed with the county auditor of said county, within sixty days after the completion of the said votes, in said county and in the townships as aforesaid, and this contract shall then be valid and legal, the same as if the said eight townships had voted the said aid and the said company shall complete its road to the points above named and within the time above specified.

It is further agreed, that in case of the ratification of this contract by a vote of the electors of the said county, and the voting of the aid as above specified, if said company shall fail to build its road, within the time hereinbefore stated, to the first-named depot, then this contract shall be deemed forfeited, and on the failure of the said company to build its road to the second-named point, within the time named, the interests of the said company in the remaining one-half of the said swamp lands and the proceeds
12 thereof, etc., as above described, shall be forfeited, and said company shall file a release of any interest therein, but if the said company should complete the construction of its railroad to the first-named depot, within the time named, the contract shall be binding to the extent of one-half interest above named.

It is further expressly agreed that the said party of the first part shall execute such further conveyances and deeds as shall carry out the spirit and intent of this contract, in compliance with the conditions and provisions above named, *named* that is upon the completion of the road to the first depot, said county shall make conveyance of the one-half interest, as above stated, to the lands and proceeds thereof, and on the completion of the road to the second point named, shall make the further conveyance on the remainder of the swamp lands, and the proceeds thereof *at* as above named, and upon the patenting of any greater number of acres of said lands or indemnity lands, shall make such further conveyances or written instruments as shall carry out the true *interest* and meaning of this contract, in every particular, between the parties thereto, and it is expressly agreed by the party of the second part that the said company will take said swamp lands and swamp indemnity lands, scrip and money as aforesaid, and all interest of the said Humboldt county in and to any additional rights or interests which may arise under the laws of the United States or the State of Iowa, in favor of the said county, except as hereinbefore specified, and if any part of said lands are now occupied by actual settlers and *and* applied for

under any resolution of the board of supervisors of said county of Humboldt, by such settlers, the said lands shall be conveyed by said party of the second part to the said settlers, at the appraised value, as fixed by appraisers heretofore appointed, or to be appointed by the board of supervisors of Humboldt county, Iowa, and in lieu of the said lands, the said railroad company, party of the second part, shall be entitled to the purchase-money as aforesaid, and in-
13 terest thereon from the date the said company shall acquire title to said lands.

This contract shall be in full force and effect in accordance with the true intent thereof from and after the same shall be ratified by a vote of the legal voters of Humboldt county, Iowa, as in such cases made and provided by law.

In witness whereof this contract is by order of the board of supervisors of the said party of the first part signed by the chairman thereof, and attested by the clerk on behalf of Humboldt county, Iowa, and on behalf of the Ft. Dodge and Ft. Ridgely Railroad Company by the president of the said company, and attested by the secretary of said company. On behalf of Humboldt county, Iowa, this 8th day of January, A. D. 1879.

B. H. HARKNESS,
Chairman of the Board of Supervisors of Humboldt Co., Ia.

Attest: ALEX. McLAUGHLIN,
County Auditor and Clerk of the Board of Supervisors of Humboldt County, Iowa.

On behalf of the Ft. Dodge and Ft. Ridgely Railroad Company this 8th day of January, A. D. 1879, by order of the board of directors of said company.

FT. DODGE AND FT. RIDGELY RAILROAD CO.,
[SEAL] By GEORGE W. BASSET, *President.*
Attest: GUS L. PETERSON, *Secretary.*

EXHIBIT B.

Exhibit B purports to be a copy of a deed or conveyance to the Fort Dodge and Fort Ridgely Railroad Company of the remaining half of the swamp lands of Humboldt county described as follows: The unsurveyed portion of sections 21, 22, 27, 28, in township 92, north range 27 west of the 5th P. M.; also the unsurveyed portions of sections 18, 19, 33, 34 in township 91, north of range
14 29 west of the 5th P. M.; also the unsurveyed portion of section- 13 and 24 in township 91, north of range 30 west of 5th P. M.; also the north half of the northeast quarter of section 29, township 93, north range 27 west of the 5th P. M.; also the south half — the southwest quarter and the northeast quarter of southeast quarter of section 31, township 93, north range 28 west of the 5th P. M., said deed being from the board of supervisors of Humboldt county, in behalf of said county and dated September 1st, 1884, and filed for record on September 6th, 1887.

EXHIBIT D.

Exhibit D purports to be a copy of a deed from the Ft. Dodge and Ft. Ridgely Railroad Company of the lands described in Exhibit B, to A. McBane, dated December 15, 1884.

EXHIBIT C.

Exhibit C purports to be a copy of a deed from A. McBane and Elizabeth McBane to Geo. R. Pearsons of the lands described in Exhibit B, dated Dec. 19, 1884, and filed for record March 4, 1885.

Temporary Injunction.

And on the 23rd day of January, 1895, Hon. Lot Thomas, presiding judge of the fourteenth judicial district of Iowa, made an order for a temporary injunction fixing the bond at $500.

And on the 9th day of April defendants filed the following:

Demurrer.

Come now the defendants in the above-entitled action and for grounds of demurrer state:

That plaintiffs' petition does not state grounds entitling them to the relief demanded.

That plaintiffs' petition does not state facts necessary to constitute a cause of action.

Said demurrer was overruled.

And on the 5th day of October, 1895, defendants filed the following:

Answer.

Come now the defendants in the above-entitled action and for answer state:

Par. 1. Deny each and every allegation contained in paragraphs 1, 2, 3, 8 and 12 of plaintiffs' petition.

Par. 2. That defendants have neither knowledge nor information sufficient to form a belief as to the allegations contained in paragraphs 4, 5, 6, 7, 9, 11 and 13 of plaintiffs' petition.

Duly verified.

And on the 15th day of November, 1895, intervenor, The State of Iowa, filed the following:

Petition of Intervention.

Comes now the State of Iowa and by leave of the court files its petition of intervention in said cause and shows the court that it claims an interest in the matter in controversy as against both the plaintiff and the said defendants.

The said intervenor alleges:

1. That the land described in the said petition of the said plaintiff was and is a part of the lake bed of a lake known as Owl lake, lying wholly within the State of Iowa, and the same did not constitute any part of the land which the United States Government was authorized or empowered to sell.

16 2. That the State of Iowa was duly admitted into the Union and became a sovereign State in the year 1846 and as such sovereign State became and was the owner of all the lakes within its borders, subject to the right of the public to use the same and for the use of the public, and the title to the soil under said lake was and is in the said State.

3. That in surveying the public lands adjoining the said lake, the same was meandered and said land adjoining said lake up to said meander lines was sold by the Government of the United States to divers different persons, and after such survey and sale of said land, the Government of the United States had no right, title or interest in and to any part of the lake bed aforesaid, but all interest, either legal or equitable, held by the United States Government had passed to the State of Iowa upon its admission as a sovereign State.

4. Said intervenor specially denies that the land described in plaintiffs' petition was within the grant of the act of Congress approved September 28th, 1853, known as the swamp-land grant. Said intervenor further denies that the said lands described in plaintiffs' petition were within the grant of the State of Iowa to the several counties of the State under and by virtue of the act of the legislature approved January 13th, 1853, or under the act approved January 5th, 1855, and also denies that the same was embraced within the terms of the contract between Humboldt county and the Ft. Dodge and Ft. Ridge y Railroad Company, and denies paragraph 4 of said plaintiffs' petition.

5. That whether or not the deeds referred to as Exhibits C and D attached to plaintiffs' petition were in fact executed, the said intervenor has no knowledge or information sufficient to form a belief, but avers that the grantors of the said deed were without any right, title or interest whatsoever in and to the said premises because the same were the property of the intervenor aforesaid.

17 6. Said intervenor further avers that said Owl lake as aforesaid in which the said lands described in said plaintiffs' petition were embraced was a lake in fact and that the same by the wrongful and unlawful acts of the said plaintiff- or some other persons unknown, has been unlawfully drained by cutting in ditches which have drawn the water of said lake therefrom, and each and every act of plaintiff-, or by whomsoever done, in draining the said lake and cutting ditches therein was unlawful and without any right or color of right on the part of said plaintiff-, or the persons so doing the same, and gave the plaintiff- or such other persons no right or interest whatsoever in the said land thus drained.

7. Plaintiff- avers that any act either in draining of said lake or in entering upon possession of the said land thus drained, done either by the plaintiff-, *his* agent or grantors, or by the defendants

or either of them, was without any right, title or authority whatsoever and any improvements put upon such lands thus drained by either the plaintiff- or the defendants, or either of them, was at their own peril and without authority for so doing.

Wherefore the said intervenor prays that a decree be entered as against both plaintiff- and the said defendants quieting the title in and to said premises in the said plaintiff- and that a writ of possession issue herein removing the said plaintiff- and the said defendants, or their agents, tenants or employés from the said premises, and for such other and further relief as equity and good conscience may require.

And on the 18th day of November, 1895, defendants filed the following:

Amendment to Answer.

Come now the defendants, Geo. A. Wallace, Geo. S. Wallace, *et al.*, in the above-entitled action and for amendment to answer therein, state:

18 Count 2.

Par. 1. That on or about the — day of ——, A. D. 1895, these defendants being advised and believing that the lands within the meander lines of what is known as Owl lake situated in township 92, north of range 27, Humboldt county, Iowa, were unsurveyed lands of the United States and subject to entry by settlers, did for the purpose of securing for themselves homes and improving and living upon the same, enter and settle upon certain lands within the limits of the meander lines of said Owl lake, built thereon houses and occupied the same as homes. That these defendants have since entering upon said lands, held the same as homes and held themselves out to the public as occupying claimants of public lands of the United States.

Par. 2. That the defendants herein settled upon and claimed for a home under the laws of the United States the following-described premises, to wit: S. E. ¼ N. W. ¼ and N. E. ¼ S. W. ¼ and S. W. ¼, N. E. ¼ and N. W. ¼ S. E. ¼, section 27, township 92, range 27, Humboldt county, Iowa, and Geo. S. Wallace, S. W. ¼, sec. 22, township 92, range 27, and that they claim the same under and by virtue of the pre-emption and homestead laws of the United States. That the lands upon which they settled were at that date unsurveyed lands of the United States.

Par. 3. Defendants further allege that on the 28th of September, 1850, the date of the act of Congress granting to the State of Iowa and other States certain swamp and overflowed lands within their respective limits for the purpose stated in said act, the lands comprised within the limits of the meander lines of Owl lake located in township 92, range 27, Humboldt county, Iowa, were covered by a body of water from six to fifteen feet in depth. That said lake had well-defined shores and high banks on the south and east sides

thereof and that the said lake was then and up to the time
19 it was drained from six to fifteen feet in depth and navigable by ordinary steamboats. That the same was not at the date of said grant of swamp lands and was not at any time thereafter swampy and that said lands comprised within the limits of the meander lines of said Owl lake did not come within the meaning of said grant as "swamp and overflowed" lands.

Par. 4. These defendants further aver that whatever rights plaintiffs may have in the land above described they are junior and inferior to those of these defendants.

Wherefore defendants ask that plaintiffs' petition be dismissed with costs of suit; that defendants be decreed to be rightfully in possession of said premises as settlers upon unsurveyed lands of the United States in good faith, and entitled to all the rights accruing to them as such settlers and have such other and further relief as they may in equity be entitled.

Duly verified.

And on July 23, 1896, plaintiff- filed the *the* following:

Amendment to Petition.

Come now the plaintiffs and amend their petition in the above and foregoing cause of action, by stating, that since the commencement of the above-entitled suit, the lands described in the petition have been patented by the United States to the State of Iowa, a inuring to the State of Iowa, under the swamp-land act of the yea 1850; that said patent has been duly filed for record in the office of the recorder of deeds of Humboldt county, Iowa, and recorded in Deed Book —, on page —, on the — day of ——, A. D. 189-; that thereafter and on the — day of ——, A. D. 189-, the State of Iowa duly patented said lands to Humboldt county, Iowa, which said patent was duly filed for record in the office of the recorder of deeds of said county, on the — day of ——, A. D. 189-, and duly recorded in Book — of Deeds, and on page —, thereof; and
20 that, by reason of the premises alleged in said petition and this amendment thereto, the ownership of said real estate is now vested in these plaintiffs.

Wherefore the plaintiffs renew the prayer of their petition.

Duly verified.

And on the 25th day of July, 1896, plaintiffs filed the following:

Answer to Petition of Intervenors.

Come now the plaintiffs, and answer the petition of intervention, as follows:

I defense.

They deny each and every allegation in said petition of intervention contained, except as the same are hereinafter admitted.

1. They admit that the land described in plaintiffs' petition was

formerly a part of what was called the bed of Owl lake, lying wholly within the State of Iowa.

2. They admit that the State of Iowa was admitted into the Union, as a State, in the year 1846.

3. They admit that, in surveying a portion of the lands adjoining the so-called lake, the same was meandered, and said land adjoining said lake up to the said meander lines, was sold by the Government of the United States to divers persons.

4. They admit that said so-called lake has been drained, and the water drawn therefrom.

II defense.

For other and still further defense to said petition of intervention, the plaintiffs state:

21 That the lands in controversy formerly formed a part of the swamp and overflowed land located in said Humboldt county, and as such the title to the same was in the United States. That by the proper officer of the Government, and by the tribunal provided by law, and on evidence properly before it, the character, quality, and condition of said lands were duly adjudicated in the manner provided by law, and the title formerly held by the United States passed to Humboldt county, through the patents mentioned in the amendment to plaintiffs' petition; and by and through the contracts made by Humboldt county to the grantors of the plaintiffs, the same has inured to the benefit of these plaintiffs, and said patents have never been set aside, nor cancelled, nor has any proceeding ever been commenced, to which the United States was or is a party, looking to such setting aside or cancellation.

III defense.

For other and still further defense to said petition of intervention, the plaintiffs state:

That on the — day of ——, A. D. 1895, the said intervenor duly patented the said land to Humboldt county, Iowa, as swamp land, and the said patent at once inured to the benefit of said plaintiffs, under the contracts and deeds made by said county to their grantors, and which are set out in plaintiffs' petition.

That said patent conveyed whatever title the State had to said land at the time of the execution of the same, and said patent has never been set aside or cancelled.

IV defense.

For other and still further defense to the petition of the intervenor, the plaintiffs state:

22 That since this action was commenced, and in the spring of, 1895, with the knowledge, acquiescence, and encouragement of said intervenor, these plaintiffs, in order to prove the character of said land as being swampy or otherwise, at *the* great cost and expense, procured affidavits of many residents of Humboldt county,

who had known the said lands for many years, as to its swampy character.

That said affidavits were submitted to the governor of the State of Iowa, who, under the provisions of chapter 138 of the Laws of the 5th General Assembly of Iowa, is authorized to adopt such means as to him may seem expedient to provide for the selection of the swamp lands of the State, and to secure to the State the title to the same.

That said intervenor, by its governor, who deemed the showing made by said affidavits to be sufficient to show that said lands were of a swampy character, and inured to the State of Iowa, under the swamp-land act of the year 1850, did, agreeably to the provisions of chapter 84 of volume 9, United States Statutes at Large, request the Secretary of the Interior to patent the said lands to the State of Iowa.

That relying upon the good faith of the State in asking the United States Government to patent said lands to it as swamp lands, and believing that the State of Iowa would, after the said lands were patented to it as swamp lands, patent the same, as swamp lands, to the county of Humboldt; and that it would not, after asking the United States Government to patent the lands as swamp lands to itself and after it had patented the same as swamp lands to Humboldt county, ever claim that the lands thus patented were not swampy, they submitted to the Commissioner of the Land Office of the United States, affidavits, and made their showing before said Commissioner as to the swampy character of said lands; that this was done by them at great cost and expense, and the showing thereby made by them was, by the Land
23 Department of the United States, deemed sufficient to prove that the said lands were swampy, and passed to the State of Iowa, under the swamp-land act of the year 1850; and accordingly, the said land was on the — day of ——, 1895, patented by the United States to the State of Iowa, as swamp land; that on the — day of ——, 1895, the said land was by the State of Iowa patented as swamp land to Humboldt county; and plaintiffs aver that the State of Iowa is now estopped to claim that title to the said lands was not in the United States in the year 1850, or to claim that said lands were not of a swampy character, or to claim that the same did not pass under the said patent, made by the United States, to the State of Iowa, or to claim that intervenor, after making its own patent to Humboldt county, purporting to convey the said lands as swamp lands, is now the owner of said lands, or has any right, title, interest, claim, or demand in or to the same.

And on November 28, 1896, the following stipulation, signed by all parties to this action, was filed:

Stipulation.

It is hereby stipulated that the following facts are admitted and that this stipulation may be introduced on the trial to prove the same, to wit:

That the defendants settled or squatted on the land—each upon the land described in his own answer and the amendment thereto—with the intention to acquire ownership thereof under the homestead or pre-emption laws of the United States in case the ownership could be thus acquired, the defendants treating the land as the unsurveyed lands of the United States.

And on the 2nd day of December, 1896, the inter-nor filed the following:

24 *Reply of Intervenor.*

Comes now said intervenor and denies each and every allegation of the plaintiffs' answer which is inconsistent with the said intervenor's petition. The said intervenor, for further reply, avers that any and all patents issued by the Land Commissioner or others in the name of the United States to the State of Iowa, and any and all acts of the governor of Iowa in requesting the said alleged patents to be issued to the State, and in issuing a patent to Humboldt county, if any was issued, were without authority of law and all such acts were done at the instance and by the procurement of the said plaintiff and upon the *ex parte* affidavits procured and prepared by said plaintiff for the purpose of inducing the said governor to take the action requested by the said plaintiff as aforesaid. Wherefore said intervenor says it is neither bound nor estopped by the acts of said governor.

Paragraph 7.

Paragraph 7 in the case of Geo. R. Pearsons *vs.* A. F. Johnson *et al.* is as follows: That said land consisted of the following-described lands, viz: Those unsurveyed portions of section 27, which if surveyed, would constitute the N. ½ of the S. W. ¼, and the S. ½ of the N. W. ¼ of section 27, township 92 north, of range 27 west, of the fifth P. M. Iowa, being a part of the lands conveyed as aforesaid by Humboldt county to the Fort Dodge and Fort Ridgely Railroad Company as shown by paragraph 4 hereof.

Paragraph 7 in the case of Pearsons *vs.* Wallace *et al.* is as follows: That said land consists of the following-described lands, to wit: The unsurveyed portions of sections 27 and 28, in township 92 north, of range 27 west, of the fifth P. M.

Paragraph 7 in the case of Rood *et al. vs.* Barrett *et al.* is as follows:

25 Par. 7. That thereafter and on the — day of ——, 1882, the said George R. Pearsons, by deed in writing conveyed the said land to the plaintiffs in this suit, and which said land these plaintiffs are now owners thereof and which said land is described as follows:

The unsurveyed portions of sections 21 and 22, in township 92 north of range 27 west of the 5th P. M., Iowa, the same being the north part of Owl lake, so called, lying within the bounds of the sections named above and enclosed by wire fence except on the south side.

Also a portion of Owl lake, so called, bounded as follows, to wit: Commencing on the southeast corner of section 21 in township 92 north of range 27, west of the 5th P. M., Iowa, thence east 186 rods; then south five and three-quarter degrees west, variation 9½°, 254 rods to the main ditch now built in the so-called Owl lake; then following the main ditch in a northwesterly direction to the section line between sections 27 and 28 in said township and range; thence north 30 chains and 80 links to the place of beginning. The same being part of the lands conveyed by Humboldt county to the Ft. Dodge and Ft. Ridgely Railroad Company as shown by paragraph 3 hereof.

Paragraph 7 in the case of Rood *et al. vs.* O'Connell *et al.* is as follows:

Par. 7. That thereafter and on the — day of ——, 1882, the said George R. Pearsons, by deed in writing conveyed the said land to the plaintiffs in this suit, and which said land these plaintiffs are now owners thereof and which said land is described as follows:

The unsurveyed portions of sections 21 and 22, in township 92 north of range 27 west of the 5th P. M., Iowa, the same being
26 the north part of Owl lake, so called, lying within the bounds of the sections named above and enclosed by wire fence except on the south side.

Also a portion of Owl lake, so called, bounded as follows, to wit: Commencing on the southeast corner of section 21 in township 92 north of range 27, west of the 5th P. M., Iowa, thence east 186 rods; then south five and three-quarter degrees west, variation 9½°, 254 rods to the main ditch now built in the so-called Owl lake; then following the main ditch in a northwesterly direction to the section line between sections 27 and 28 in said township and range; thence north 30 chains and 80 links to the place of beginning. The same being part of the lands conveyed by Humboldt county to the Ft. Dodge and Ft. Ridgely Railroad Company as shown by paragraph 3 hereof.

Issue having thus been joined, all parties proceeded to trial at the November term of said court and there was introduced the following

Evidence on Behalf of the Plaintiff.

It was agreed by and between the parties to the foregoing cases, that the evidence should be taken in these five cases at the same time and should apply to each as far as the same should be applicable.

It was further agreed that all of the testimony should be taken subject to all legal objections except as to the form of the question and except the objection to testimony that the question is leading, that the evidence sought to be elicited is not the best evidence, or

that the proper foundation for the introduction of the testimony is not properly or has not been properly laid, shall be made at the time the testimony is offered.

Plaintiffs offer and read in evidence chapter 84 of the 9th U. S. Statutes at Large, approved on September 28th, 1850.

27 Plaintiffs next offer and read in evidence an act of the General Assembly of the State of Iowa, approved February 2nd, 1853, entitled: "An act to dispose of the swamp and overflowed lands in the State and to pay the expense of selecting and surveying the same."

Plaintiffs next offer and read in evidence, a patent of the State of Iowa to Humboldt county, covering the unsurveyed portions of sections 21, 22, 27 and 28 in township 92, north of range 27, west of the 5th P. M., containing an estimated acreage of 800 acres, which said patent bears the date of the 30th day of April, A. D. 1895, and was duly certified by the secretary of state and recorded in volume 2, page 484, and was filed for record in Humboldt county on the 1st day of June, 1895, said patent being marked by the reporter "Exhibit A."

The intervenor objects to the introduction of said patent in addition to the general objection heretofore made, because it does not appear that the governor of the State had any authority to execute said patent or that the land named therein was such as was contemplated by the act under which he assumed to act, and is incompetent and void for uncertainty.

The plaintiffs next offer and read in evidence, a duly certified copy of a patent from the United States to the State of Iowa, purporting to convey the unsurveyed portions of sections 21, 22, 27 and 28, in township 92, north of range 27, west of the 5th P. M., containing an estimated area of 800 acres, said offer being marked "Exhibit B."

EXHIBIT B.

No. 59.

The United States of America to all to whom these presents shall come, Greeting:

Whereas, by the act of Congress approved September 28, 1850, entitled "An act to enable the State of Arkansas and other

28 States to reclaim the 'swamp lands' within their limits," it is provided that all the "swamp and overflowed lands" made unfit thereby for cultivation, within the State of Iowa, which remained unsold at the passage of said act, shall be granted to said State:

And whereas, in pursuance of instructions from the General Land Office of the United States, the several tracts or parcels of land hereinafter described, have been selected as "swamp and overflowed lands," inuring to the said State under the act aforesaid, situate in the district of lands subject to sale at Des Moines, Iowa, to wit:

Fifth principal meridian, township ninety-two (92) north of range twenty-seven (27) west.

The unsurveyed portion of sections twenty-one, twenty-two, twenty-seven and twenty-eight, containing an estimated area of eight hundred acres, and for which the governor of the said State of Iowa did on the eighth day of April, one thousand eight hundred and ninety-five, request a patent to be issued to the said State, as required in the aforesaid act.

Now, therefore, know ye, that the United States of America, in consideration of the premises, and in conformity with the act of Congress aforesaid, have given and granted, and by these presents, do give and grant, unto the said State of Iowa, in fee-simple, subject to the disposal of the legislature thereof, the tracts of land above described.

To have and to hold the same, together with all the rights, privileges, immunities and appurtenances thereto belonging, unto the said State of Iowa, in fee-simple, and to its assigns forever.

In testimony whereof, I, Grover Cleveland, President of the United States of America, have caused these letters to be made patent and the seal of the General Land Office to be hereunto affixed.

29 Given under my hand at the city of Washington, the nine-
teenth day of April, in the year of our Lord one thousand
[L. S.] eight hundred and ninety-five, and of the Independence of the United States the one hundred and nineteenth.

By the President:

GROVER CLEVELAND.

By M. McKEAN, *Secretary.*

L. Q. C. LAMAR,
Recorder of the General Land Office.

Recorded vol. 2, p. 89.
Filed April 27th, 1895.

W. M. McFARLAND,
Secretary of State.

Intervenor makes the same objection as to the last offer.

The plaintiffs next offer and read in evidence section 3, chapter 138, of the Acts of the 5th General Assembly, approved January 25th, 1855.

Plaintiffs next offer and read in evidence from the Supervisors' Record, number 2, the same being the contract set out in plaintiffs' petition in Exhibit A.

The intervenor objects to this evidence, as there appears to be no authority for the board of supervisors to execute such a contract, nor does the same relate to this land in controversy.

Plaintiffs next offer and read in evidence a deed which is set out as Exhibit B to plaintiffs' petition.

Intervenor objects to this deed because it does not refer to the land in controversy, and there is nothing to show that the county had any interest therein, and that the county had authority, at the time the conveyance was made, to make it.

Plaintiffs next offer and read in evidence deeds from the Fort

Dodge and Fort Ridgely Railroad Company to A. McBane,
30 and from A. McBane and wife to George R. Pearsons, said deeds being set out as Exhibits D and C respectively to plaintiffs' petition.

Intervenor objects to the offer as too indefinite in the description of the land attempted to be conveyed, and is null and void for want of definiteness.

Plaintiffs next offer and read in evidence the copy of the plat of the original United States survey of sections 21, 22, 27 and 28 of township 92 north, of range 27 west, of the 5th P. M., showing the surveyed and unsurveyed portions of said sections.

Intervenor objects as incompetent and immaterial, and the plat has no certificate of the secretary of state.

Plaintiffs next offer and read in evidence the record of deeds from Pearsons and wife to Edwin O. Rood and Chas. W. Rood, conveying the various tracts of land described in plaintiffs' various petitions in paragraph 7 of said petitions respectively.

Plaintiffs next offer and read in evidence a letter from the governor of Iowa addressed to the Honorable Commissioner of the Land Office, dated February 12th, 1895, with certain affidavits attached, the following being a copy of said letter and affidavits:

FEBRUARY 12TH, 1895.

To the Honorable Commissioner of the Land Office, Washington, D. C.

SIR: Herewith I hand you papers of Geo. R. Pearsons, E. O. Rood and C. W. Rood addressed to the governor of Iowa, requesting that application be made to have the necessary action taken to procure the patenting of the lands described in said papers, to wit: the unsurveyed portions of sections 21, 22, 27 and 28 in township 92 north, of range 27 west, in Humboldt county, Iowa, to the State of Iowa by the United States. The papers are first the petition of
31 said Pearsons, E. O. Rood and C. W. Rood; second, the affidavits of Geo. R. Pearsons, J. W. Foster, H. K. Winne, R. F. Johnston, John Johnston, F. F. French, N. R. Jones, H. W. McCauley and John Bartholomew as to the character of said land, and third, a map and plat showing said land consisting of about 800 acres and also showing the surrounding lands including a tract known as the "Impassible marsh." I have investigated the question as to the character of one tract known as "Owl lake" and am satisfied that it was and is of the character contemplated by the swamp-land act of 1850, and that it should be patented to the State.

I respectfully request that action be taken by the Secretary of the Interior and your office to determine the character of said tract of land, and that patent issue therefor to the State of Iowa.

FRANK D. JACKSON,
Governor of Iowa.

STATE OF IOWA, } ss:
Humboldt County, }

I, Ole H. Korslund, being first duly sworn, depose and say that I have resided in Humboldt county, Iowa, for 20 years; that for 20 years I have known what is generally termed Owl lake; that during the years I have known it, it has been in general character quite similar to the swamp land known as Impassable marsh to the south and southwest thereof; that during said time there had grown in said so-called Owl lake, long grass, reeds, weeds, rushes, etc., and the same has been swamp land and as above stated, of the same general character as the swamp to the south and west thereof, which has been patented to the State as swamp land, and I further depose and say that since I have known the so-called lake the same has at times been dry in part, and this was true before said lake was ditched or drained.

OLE H. KORSLUND.

I, Ole W. Williksen, being first duly sworn, depose and say
32 that I have resided in Humboldt county, Iowa, for 23 years; that for 23 years I have known what is generally termed Owl lake; that during the years I have known it, it has been in general character quite similar to the swamp land known as Impassable marsh to the south and southwest thereof; that during said time there have grown in said so-called Owl lake, long grass, reeds, weeds, rushes, etc., and the same has been swamp land, and as above stated, of the same general character as the swamp land to the south and west thereof, which has been patented to the State as swamp land, and I further depose and say that since I have known the so-called lake the same has at times been dry in part, and this was true before said lake was ditched or drained.

OLE W. WILLIKSEN.

I, O. Halgrims, being first duly sworn, depose and say that I have resided in Humboldt county, Iowa, for 24 years; that for 24 years I have known what is generally termed Owl lake; that during the years I have known it it has been in general character quite similar to the swamp land known as Impassable marsh to the south and southwest thereof; that during said time there have grown in said so-called Owl lake, long grass, reeds, weeds, rushes, etc., and the same has been swamp land and, as above stated, of the same general character as the swamp land to the south and west thereof which has been patented to the State as swamp land, and I further depose and say that since I have known the so-called lake the same has at times been dry and this was true before said lake was ditched or drained.

O. HALGRIMS.

To his excellency Frank D. Jackson, governor of Iowa:

Your petitioners, George R. Pearsons, E. O. Rood and C. W. Rood, respectfully show that in sections 21, 22, 27 and 28 in township 92, north of range No. 27 west, in Humboldt county, Iowa, there was a

tract of about 800 acres of swamp and overflowed land, covered by the swamp-land grant of September 28, 1850, which was
33 largely covered with water and grown up to rushes, weeds and wild grass. This tract was meandered by the U. S. surveyor, and appears and is known on the plats and surveys of the Government as "Owl lake," but while called a lake on said plat it was in fact of the same character as the large tract lying a short distance south thereof, and known as the "Impassable marsh" and as hundreds of other swamp-land tracts.

That said county of Humboldt disposed of said land, as swamp land, and the said tract by mesne conveyances became and now is the property of your petitioners. That your petitioners have expended large sums of money in draining and reclaiming said tract of land, and that all of said tract is now fully reclaimed and tillable and suitable for the cultivation of wheat, corn, oats and other products; that about 500 acres thereof is under plow. That all of said tract has been in the actual possession and occupation of your petitioners for more than ten years last past and has been enclosed by a fence since early in 1885.

These petitioners show that these lands were regarded by said Humboldt county as swamp lands, and conveyed as such, and were purchased by these petitioners as swamp land, and possession of said land taken by your petitioners and said improvements made thereon, and that to perfect the record title to said tract in your petitioners the officers of the General Land Office should take the necessary action to satisfy themselves of the facts hereinbefore set forth, and then patent said land to the State of Iowa.

We have caused said land to be surveyed and platted and attach hereto a map and plat of said land.

We respectfully ask that you take the necessary action to procure the patenting of said tract of land to the State of Iowa, and in further support of this application, we submit herewith the affidavits of
F. F. French, N. R. Jones, John Johnston, R. J. Johnston,
34 H. W. McConley, S. K. Winnee, J. W. Foster, John Bartholomew, and George R. Pearsons.

Dated February 6, 1895.

GEO. R. PEARSONS.
E. O. ROOD.
CHAS. W. ROOD.

STATE OF IOWA, }
Webster County, } ss:

I, George R. Pearsons, being first duly sworn, do depose and say that I am, and for more than 25 years last past have been, a resident of Fort Dodge, Webster county, Iowa; that I am now the owner of about 300 acres of land in the unsurveyed portions of sections 21, 22, 27 and 28 in township 92 north of range 27, west of the 5th P. M. in Humboldt county, Iowa, and that the remaining 500 acres of said unsurveyed tract belongs to E. O. Rood and C. W. Rood, to whom I sold and conveyed the same; that said tract of land was swamp and overflowed land and as such was granted to the State

of Iowa by the United States under the swamp-land act of September 28th, 1850, and by act of the legislature of Iowa with other swamp lands became the property of said Humboldt county; that for the purpose of securing the construction of a line of railroad in said Humboldt county, said county contracted with the Fort Dodge and Fort Ridgely Railroad Company to convey all the swamp lands then belonging to said county, or which should accrue to said county to said railroad company, and in pursuance and in performance of said contract said lands were conveyed by said Humboldt county to A. McBane, trustee, and by said McBane, trustee, to this affiant, and this affiant received said title to all said tract of land in 1884.

That said tract was unsurveyed and on the Government plat appeared as a meandered tract and was designated "Owl lake;" that in the same manner this affiant became the owner of a tract of land to the south of the first-mentioned tract, also meandered and unsurveyed and designated "Impassable marsh."

35 The two tracts were separated by a narrow strip of high land 80 to 100 rods in width, and were alike in character. Both tracts were largely covered with water, with much of both grown up to rushes, reeds, weeds and coarse wild grass.

In 1884 I cut a ditch through the ridge between the two tracts and a ditch running from the so-called Owl lake in the direction of Boone river. The level of the water in Owl lake was about one foot lower than in the Impassable marsh before said ditching was done, and the effect of the ditching in 1884 was to carry off most of the water in the Owl Lake tract, and about all of the water in the Impassable Marsh tract. In the early part of 1885, I fenced both tracts and used them for pasturage, and Owl lake has been occupied by me and by said grantees continuously since I ditched said land in the summer of 1884.

In 1891 I enlarged and deepened the outlet ditch to said Owl Lake tract, so as to drain said land, and in the summer of 1892, the said E. O. Rood and C. W. Rood and I cut ditches through said tract, so that in the year 1892 all of said Owl Lake tract was fully drained and reclaimed, and became tillable and suitable for the raising of all kinds of crops grown in Humboldt county, and at this time about 500 acres of said tract is under plow, and the remainder is in condition to be plowed and cultivated.

That I expended nearly $2,400 in putting in said outlet ditch from said Owl Lake tract of 800 acres, and in 1892 the said E. O., C. W. Rood and I expended about $3,400 in putting in said ditches in and through said tract of 800 acres, and by reason of said ditching said land was so reclaimed, and made suitable for cultivation. That in cutting said ditches in 1892 we discovered that some time in the past said tract had been so dry that there had been fire in the low places, there being ashes and other evidences of said fire.

I first saw and became acquainted with said Owl Lake tract
36 in the year 1869 and it was then swampy, marshy, and overflowed land, and was certainly of the character contemplated by the swamp-land act of 1850, and so remained until drained and

reclaimed as hereinbefore set forth. It was then about the same in condition and character as said Impassable Marsh tract, which was patented to the State in the year 1885, and as many other tracts of swamp land in this region of country.

GEO. R. PEARSONS.

STATE OF IOWA, *Humboldt County,* } ss:

I, F. F. French, being first duly sworn, do depose and say that I have been a resident of Humboldt county, Iowa, for 26 years last past.

That for 26 years last past I have been acquainted with the condition, description, situation and character of the unsurveyed portions of sections 21, 22, 27 and 28 in township 92 north of range 27 west of the 5th P. M., in Humboldt county, Iowa, and embracing what is known as Owl lake in said county of Humboldt.

That I have heard read the affidavit of George R. Pearsons made in support of his application to the General Land Office of the United States for the survey and patenting of said lands, and specially that portion of said affidavit which relates to the character and description of the said tract of land. That said tract at the time that I first became acquainted with its character and up to the time the same was drained, as stated in the affidavit of said Pearsons, was swampy, marshy and overflowed and was of a character until drained and reclaimed as would entitle it to be designated as swamp lands and within the purview of the swamp-land act.

That for said period of time I was also acquainted with the tract adjoining the said last-named tract known as Impassable
37 marsh, and that the character of said Impassable marsh and the tracts embraced in the unsurveyed portions of the above-named sections designated as Owl lake was of the same character, both tracts were largely covered with water with much of both grown up to rushes, reeds, weeds and coarse wild grass.

F. F. FRENCH.

I, N. R. Jones, being first duly sworn, do depose and say that I have been a resident of Humboldt county, Iowa, for 22 years last past.

That for 20 years last past I have been acquainted with the condition, description, situation, and character of the unsurveyed portions of sections 21, 22, 27 and 28 in township 92 north of range 27 west of the 5th P. M., in Humboldt county, Iowa, and embracing what is known as Owl lake in said county of Humboldt.

That I have heard read the affidavit of George R. Pearsons made in support of his application to the General Land Office of the United States for the survey and patenting of said lands, and especially that portion of said affidavit which relates to the character and description of the said tract of land. The said tract at the time that I first became acquainted with its character and up to the time the said land was drained, as stated in the affidavit of said Pearsons, was swampy, marshy and overflowed and was of a character until

drained and reclaimed as would entitle it to be designated as swamp lands and within the purview of the swamp-land act.

That for said period of time I was also acquainted with the tract adjoining the said last-named tract known as Impassable marsh and that the character of said Impassable marsh and the tract embraced in the unsurveyed portions of the above-named sections designated as Owl lake was of the same character, both tracts were largely covered with water with much of both grown up to rushes, reeds, weeds and coarse wild grass.

N. R. JONES.

38 I, John Johnston, being first duly sworn, do depose and say that I have been a resident of Humboldt county, Iowa, for 39 years last past.

That for 39 years last past I have been acquainted with the condition, description, situation and character of the unsurveyed portions of sections 21, 22, 27 and 28 in township 92 north of range 27 west of the 5th P. M., in Humboldt county, Iowa, and embracing what is known as Owl lake in said county of Humboldt.

That I have heard read the affidavit of George R. Pearsons made in support of his application to the General Land Office of the United States for the survey and patenting of said lands, and specially that portion of said affidavit which relates to the character and description of the said tract of land. That said tract at the time that I first became acquainted with its character and up to the time the same was drained, as stated in the affidavit of said Pearsons, was swampy, marshy and overflowed and was of a character until drained and reclaimed as would entitle it to be designated as swamp lands and within the purview of the swamp-land act.

That for said period of time I was also acquainted with the tract adjoining the said last-named tract known as Impassable marsh, and that the character of said Impassable marsh and the tracts embraced in the unsurveyed portions of the above-named sections designated as Owl lake was of the same character, both tracts were largely covered with water with much of both grown up to rushes, reeds, weeds and coarse wild grass.

JOHN JOHNSTON.

I, A. J. Johnston, being first duly sworn, do depose and say that I have been a resident of Humboldt county, Iowa, for 39 years last past.

39 That for 25 years last past I have been acquainted with the condition, description, situation, and character of the unsurveyed portions of sections 21, 22, 27 and 28 in township 92 north of range 27 west of the 5th P. M., in Humboldt county, Iowa, and embracing what is known as Owl lake in said county of Humboldt.

That I have heard read the affidavit of George R. Pearsons made in support of his application to the General Land Office of the United States for the survey and patenting of said lands, and especially that portion of said affidavit which relates to the character

and description of the said tract of land. The said tract at the time that I first became acquainted with its character and up to the time the said land was drained, as stated in the affidavit of said Pearsons, was swampy, marshy and overflowed, and was of a character until drained and reclaimed as would entitle it to be designated as swamp lands and within the purview of the swamp-land act.

That for said period of time I was also acquainted with the tract adjoining the said last-named tract known as Impassable marsh, and that the character of said Impassable marsh and the tract embraced in the unsurveyed portions of the above-named sections designated as Owl lake was of the same character; both tracts were largely covered with water, with much of both grown up to rushes, reeds, weeds and coarse wild grass.

A. J. JOHNSTON.

I, H. W. McCauley, being first duly sworn, do depose and say that I have been a resident of Humboldt county, Iowa, for 32 years last past.

That for 20 years last past I have been acquainted with the condition, description, situation and character of the unsurveyed portions of sections 21, 22, 27 and 28 in township 92 north of range 27 west of the 5th P. M., in Humboldt county, Iowa, and embracing what is known as Owl lake in said county of Humboldt.

That I have heard read the affidavit of George R. Pearsons made in support of his application to the General Land Office of the United States for the survey and patenting of said lands, and specially that portion of said affidavit which relates to the character and description of the said tract of land. That said tract at the time that I first became acquainted with its character and up to the time the same was drained, as stated in the affidavit of said Pearsons, was swampy, marshy and overflowed, and was of a character until drained and reclaimed as would entitle it to be designated as swamp lands and within the purview of the swamp-land act.

That for said period of time I was also acquainted with the tract adjoining the said last-named tract known as Impassable marsh, and that the character of said Impassable marsh and the tracts embraced in the unsurveyed portions of the above-named sections designated as Owl lake was of the same character; both tracts were largely covered with water, with much of both grown up to rushes, reeds, weeds and coarse wild grass.

H. W. McCAULEY.

I, S. K. Winne, being first duly sworn, do depose and say that I have been a resident of Humboldt county, Iowa, for 24 years last past.

That for 24 years last past I have been acquainted with the condition, description, situation, and character of the unsurveyed portions of sections 21, 22, 27 and 28 in township 92 north of range 27

west of the 5th P. M., in Humboldt county, Iowa, and embracing what is known as Owl lake in said county of Humboldt.

That I have heard read the affidavit of George R. Pearsons made in support of his application to the General Land
41 Office of the United States for the survey and patenting of said lands, and especially that portion of said affidavit which relates to the character and description of the said tract of land. The said tract at the time that I first became acquainted with its character and up to the time the said land was drained, as stated in the affidavit of said Pearsons, was swampy, marshy and overflowed, and was of a character until drained and reclaimed as would entitle it to be designated as swamp lands and within the purview of the swamp-land act.

That for said period of time I was also acquainted with the tract adjoining the said last-named tract known as Impassable marsh and that the character of said Impassable marsh and the tract embraced in the unsurveyed portions of the above-named sections designated as Owl lake was of the same character, both tracts were largely covered with water with much of both grown up to rushes, reeds, weeds and coarse wild grass.

S. K. WINNE.

I, J. W. Foster, being first duly sworn, do depose and say that I have been a resident of Humboldt county, Iowa, for 27 years last past.

That for 27 years last past I have been acquainted with the condition, description, situation and character of the unsurveyed portions of sections 21, 22, 27 and 28 in township 92 north of range 27 west of the 5th P. M., in Humboldt county, Iowa, and embracing what is known as Owl lake in said county of Humboldt.

That I have heard read the affidavit of George R. Pearsons made in support of his application to the General Land Office of the United States for the survey and patenting of said lands, and especially that portion of said affidavit which relates to the character and description of the said tract of land. That said tract at the time that
42 I first became acquainted with its character and up to the time the same was drained, as stated in the affidavit of said Pearsons, was swampy, marshy and overflowed and was of a character until drained and reclaimed as would entitle it to be designated as swamp lands and within the purview of the swamp-land act.

That for said period of time I was also acquainted with the tract adjoining the said last-named tract known as Impassable marsh, and that the character of said Impassable marsh and the tracts embraced in the unsurveyed portions of the above-named sections designated as Owl lake was of the same character, both tracts were largely covered with water with much of both grown up to rushes, reeds, weeds and coarse wild grass.

J. W. FOSTER.

I, John Bartholomew, being first duly sworn, do depose and say that I have been a resident of Humboldt county, Iowa, for 30 years last past.

That for 24 years last past I have been acquainted with the condition, description, situation, and character of the unsurveyed portions of sections 21, 22, 27 and 28 in township 92 north of range 27 west of the 5th P. M., in Humboldt county, Iowa, and embracing what is known as Owl lake in said county of Humboldt.

That I have heard read the affidavit of George R. Pearsons made in support of his application to the General Land Office of the United States for the survey and patenting of said lands, and especially that portion of said affidavit which relates to the character and description of the said tract of land. The said tract at the time that I first became acquainted with its character and up to the time the said land was drained, as stated in the affidavit of said Pearsons, was swampy, marshy and overflowed and was of a character until
43 drained and reclaimed as would entitle it to be designated as swamp lands and within the purview of the swamp-land act.

That for said period of time I was also acquainted with the tract adjoining the said last-named tract known as Impassable marsh and that the character of said Impassable marsh and the tract embraced in the unsurveyed portions of the above-named sections designated as Owl lake was of the same character, both tracts were largely covered with water with much of both grown up to rushes, reeds, weeds, and coarse wild grass.

JOHN BARTHOLOMEW.

The intervenor objects to these offers and letters and affidavits attached thereto because the same are without authority of law, and the governor having no authority whatever to request the Land Department of the United States to issue a patent for property belonging to the State, and if this is offered for the purpose of estopping the State, the action of the governor appears thereupon to be taken with or at the request of the parties now claiming the lake bed. No objection to the form of the offer, the letter and affidavits, is made provided that on request of the intervenor, a proper certificate is hereafter procured.

Plaintiffs rest.

Evidence on Behalf of the Intervenor.

Intervenor introduces the field-notes of township 92 north, range 27 west of the 5th P. M., which is a certified copy of the same filed with the county auditor, and also the certificate of the secretary of state.

It is agreed that certified copies of public records shall have the same force and effect as the records themselves would have, being subject only to the same objections.

It is conceded by plaintiffs that the county of Humboldt was organized on January 15th, 1857.

44 It is further agreed that the instructions of the Land Department to the surveyors, or any part thereof, shall be considered in evidence.

Plaintiff objects to said offer as incompetent, immaterial, irrelevant, and because the instructions to the United States surveyors can in no manner tend to impeach the patent made to the State of Iowa by the United States on the request of the governor of said State.

LEANDER BARTOR, on behalf of the intervenor, testified:

I live at Lu Verne, Kossuth county; came to Humboldt county in the fall of 1865. I first saw Owl lake about the first of October, 1865, and I was on the banks of the lake frequently for the next ten years. I lived about eleven miles from the lake and passed the lake back and forth.

The deepest water was on the south and southeast, and was clear from the grass, while on the north side, a heavy moss and stuff covered the water. The year 1865 was a very dry season up to the middle of October. Going up to the lake, the banks were dry and sandy. On the south side it was timber and that was also high and dry. The grass at the north and west was heavy; you could see how far the water went, but a man could not get anywhere near. There was wet land on the north and west of where the lake proper was. As near as I can recollect, there was something like a half section or more of land covered with water, or maybe twice that amount, but I think not less than half a section. I don't recollect just when I saw it last, but I have been there in the winter when it was frozen, and it extended over a great deal more ground then it did when I first saw it. I have never fished in the lake, but I have heard men say that they caught fish there.

Cross-examination:

The summer and the fall of 1865 was dry until the 20th of October; then we had heavy rains. I never was on the water except when it was frozen. That was the winter following, and
45 several times after that I crossed it to the north and south side. When I first saw it, I came in from the northeast, and was around to the south side where the timber was. There was an old man there who said that he lived on the south side. The timber came right down to the water. I could not see any grass, looking west. The lake seemed to run the whole length of the timber, fully a half mile. The timber extended from the lake shore down to the road. The deep water extended out a little further east then where the timber was. I do not think that the open water was over 60 rods wide at the east point of the timber north. My recollection is that it was something from a quarter to a half mile wide from east to west. The north part seemed to be in grass. I remember where the house was built on the east shore. It was there a good many years, and there was a shanty there when I first went there. There were several clusters of timber on the north shore

but one piece of ground was a good deal higher than the other. The outlet was up to the northeast.

Redirect:

The timber on the high ground to the north was on what was called by some, the island.

LESLIE BARTON, on behalf of the intervenor, testified:

I have lived in the northern part of Vernon township, in Humboldt county, for about thirty-one years. I first saw the lake in the spring of 1866. I did not see it very frequently after that; I saw it most as I passed it with a team, teaming. Our road used to run up by there when we went to Fort Dodge. The road we traveled went along the east side. I remember something about the little stream that was an outlet of the lake. The road crossed quite a little ways down, it was a better crossing; the road slunk away from the lake a little, and we didn't try to cross very near the lake.

When I first saw the lake in the spring of 1866, it looked
46 quite large to me. I took more notice of it for I had heard considerable of it. I didn't examine any more than I could see on the east side. I passed along the east side on what was a kind of a bluff near the lake. It was a good road when it was wet; other places seemed to be an embankment. I could see by looking west that it looked like quite a body of water. I don't know whether the water was higher than the first day I saw it or not. At that time the open water seemed to me to be larger than at any time I ever noticed it. There may have been a section of water that was clear. Another fall it didn't look so much, but through the summer reeds and rushes grew up and hid it, and didn't seem to be such a body of water as in the spring. The bank on the east side was a number of feet above the water a part of the way. I would call it a drift. I know it made a nice road and we liked to go there to feed. The bank was sand along part of the way. The water was sandy so we could go down to get water. I don't recollect it was so all the way; there were places we could go to water by team. I saw the lake more in the first ten years than I have since, because afterward we didn't team across there. I didn't see that there was any difference in the appearance of the lake during the first ten years, only in the different times of the year. I always thought that it looked higher in the spring than it did in the fall, but I didn't see any other perceptible change. The last time I saw the lake was five or six years ago, and at that time came across the west end of it. I was on horseback. It was wet and marshy on the west side, and some bullrushes seemed to grow further than there was water, and I had to stop several times and verge further from the lake to get across. I thought that was after the first ditch, but still I never saw the first ditch them days. I did not see any open water at the west end at that time. I tried to stay away from the lake on account of the good ground. I didn't try to get to the water. I was merely trying to make my way around to where Mr. James lived, on the south side.

47 Cross-examination:

There was no building that I recollect of on the east side. There was an outlet on the northeast corner, a little more to the north, up to the east end probably. My recollection is that the lake was longest to the northwest. There was timber on both the north and south sides. My recollection is that the open water extended to the timber on the south. I do not recollect of any timber on the east side. I never went down to the east side of the lake to get to the open water. I always came east of the timber. There was timber on the north side, northeast corner, and it looked to me as if there might be a little island, maybe two or three islands. I always went around that timber. I do not recollect of being along the east side within fifteen years. When I first saw the lake, it looked as though it might extend north from the south shore three-quarters of a mile, or possibly a mile straight north, not right at the east end; it was wider when I got further west. It became narrower at the east end of the timber. The lake was not square; it was more round or pointed. The timber did not come as far east as the lake. I did not view the lake from the timber line. I did not notice the tall grass, but there were no banks. I do not recollect of any water north of the timber on the northeast corner of the lake. I never saw the lake navigated.

J. H. FOLEY, on behalf of the intervenor, testified:

I came to Humboldt county in the spring of 1863, and now live in Vernon township in this county. I have known Owl lake since June, 1863, at which time I first saw it. I presume that I have been around the lake fifty times the last thirty years. The last time that I saw it was when Mr. Pearsons was draining it out, which was I think in 1884–'5. When I first saw the lake, there was a body of clear water on the south side. On the north it was very marshy, high rushes and water. The water extended away back a good ways into the marsh, but you couldn't see it until you got
48 into it. There was some high rushes, and some two or three islands to the north that had little belts of timber on them. There was also a belt of timber on the south side of the lake. On the south, the bank was what you might call a rise of ground. It seemed to rise from the lake right up, and then after you got over south a ways, it fell off again in a flat level. There was a rise of ground or roll, rather, all along on the south. I should judge it was eight or ten feet above the water level. Along the east side, the banks are lower, sandy, something like a sand drift, might have drifted out of the lake or something of that kind; a very few shrubs along the east side. There was a road on the high bank on the east. We used to travel right along by the bank of that lake across the sandy ridge to go to Ft. Dodge. I have been on the ice but have never been in the water. I never fished there; I heard of some boys catching fish in the ditch after it was opened, going in or out. When I last saw the lake, the water was pretty low. The lake had gradually sunk since the *the* first time I saw it, and where years ago there used to be clear water, it had grown up in rushes.

The rushes were working in from the north side towards the south. I had occasion to go around there a good many times to see parties who lived around there. During the wet seasons, the lake, of course, was high. For the last ten years, the country has been dryer, and the water seemed to be settling away. There were for quite a number of years, wet seasons; at that time there was a large body of water there that backed up in the country, for probably a mile from the lake. The water seemed to remain back in these marshes and sloughs to the north, you know. I saw the ditch which Mr. Pearsons cut to drain the lake. I saw it on the east side, and on the southwest where he drained it into that marsh to the south. It was a pretty big ditch where it emptied into the lake, and where it emptied out, it wasn't so deep. I went over to look at it shortly after they tapped the lake, and there was probably six or eight feet of water in the ditch. I don't know how deep the water in the ditch was.

49 Cross-examination:

I lived just four miles north of the lake in 1863. The lake is located on sections 21, 22, 27 and 28, I believe. There was a little sheltered strip along the east side, north of the outlet. I never have been over to where Rood's house now is. There was a strip of high ground in what was called the lake. There was some timber growing there; there were three islands on the north that had timber on them. The open water was on the south side next to the timber there. The open water did not go a great ways further east than the timber. The timber must have extended along there for nearly a half mile. The same grove is there now, but some of it may have been cut off; the open water extended the whole length of the timber. I think that I would be safe in saying that the clear water covered a quarter of a section. To the north of the island, there was water that extended all around the outside. You could not see it until you got right onto it on account of the tall grass and rushes. The high points which I called islands were further north than the house which I was speaking of as being on the east side. I know of but one outlet to the lake on the side on which the house is located. There are four or five inlets. There is quite an inlet on the west. I know in the early day I used to drive nearly a mile west to keep out of the swamp. There is a little timber and quite a high piece of ground along by Norton's place southeast of section twenty-one. There was a series of ponds or sloughs to the northwest of that. Norton built a corduroy bridge of wood and brush, probably twenty rods long, to get in there. I supposed the pond and sloughs were caused by the water from the lake backing up there. They emptied into the lake and into that marsh. I suppose the water went from the outlet on the east of the lake, and the outlet and the Boone river were the natural water-course.

Redirect:

50 The sloughs and ponds that have been recalled are right north of there about in twenty-one. They are north of the

island lakes. The overflow from the low places or marshes in sections 15, 16, 17, 18, 20, 21 and 28 was all into the lake and comes in near the Norton place, a little south. In the high water the water run in the level. The inlet was covered with sod, peat, and regular marsh.

E. W. OLDEN, on behalf of the intervenor, testified:

I first came to Humboldt county in 1863, and now live in Renwick. I am acquainted with Owl lake, and first saw it some time during the summer or fall of 1863. I live five miles north of the lake. Describing Owl lake, when I first saw it, I saw a part of what we call the lake was a clear body of water running lengthwise, what I would call lengthwise east and west. North of this clear water was a marshy tract of land further up to—well, perhaps a mile and a half or such a matter there was several little islands around the lake, or it appeared raised in the water, that there was timber in it. The clear water was only on the south edge of the lake. The north part of the lake was boggy and marshy and rushes. I was in that marsh in the summer of 1863. In places the rushes or wild rice were eight or ten feet high, and there was water over the ground. The foundation was very uncertain. When you first stepped in, the water was all the way from one to three feet deep. This extended, as near as I can recollect, a mile and a half north of the clear water. The island which had clear water to the south of it was known as Indian Grove. It is in the northeast part of the lake. There was water free from rice or rushes west of the outlet, or north and west, further north as you go around this Indian Grove. Indian Grove was north and west of the outlet only a few rods, ten or fifteen from the edge of the timber to the outlet. There was a sandy ridge on the east shore of the lake from two to ten rods in width. If the water in the lake was high, the ridge was three or four feet above the water level. There was no material change in the
51 level of the water until after the ditching was done; there was fully four feet variation between dry and wet seasons. Up to 1879, the lake was substantially the same as it was when I first saw it. The lake was drained twice. The first ditch lowered the water two or three feet. The last ditch was a big one. It was from six to seven feet deep, varying with the land they were ditching through. There is a bridge across the ditch east of the lake, and I think that it is over five feet from the top of the ditch to the bottom. To the east, south, and part of the way west, there were well-defined banks or shores to the lake when I first saw it. Near Norton's place there were no banks. His place was between two of the inlets that I referred to above. All of the land which I referred to as marshy was covered with water, I think.

Cross-examination:

To the northwest was very little grass and rushes. The wild rice and big rushes grew along the south part of that Norton place; there was no open water to speak of north of Indian Grove. To the

north of Indian Grove, there was another outlet, which discharged into the other outlet perhaps a mile east. I have been out in the lake in a boat. There was a chain of sloughs to the northwest of the Norton grove and they discharged water into Owl lake. I have seen that whole country up there overflowed when there were heavy rains and after a time, it would go down. The country remained wet up through there, more or less, until Owl lake was drained. After the first ditch was dug, about three or three and a half feet of water was drained off, but quite a little body of water was left. It did not drain all except a little of that open space on the south side. I saw water clear up to the north end of the marsh after the first ditch was dug. I do not mean open water, not among the grasses and flags. It was not right after a rain. I went down to see that ditcher work and there was two or three feet of water in there. I saw a dam there that was put in to shut off the water, I didn't think that it held the water very much for it was not high
52 enough; the water was running over it. The dam was for the purpose of getting fuel up through the ditch. It was when they were putting in the ditch. After the digging of the first ditch, the water receded from the shores perhaps five rods on an average, and the rest was covered with water. I was out in the east part of the main lake in a boat before the first ditch was dug, just for fun; didn't go north of Indian Grove.

Redirect:

I have fished in the lake frequently. Don't know whether there were fish in the lake at the first time I saw the lake. I know of other people fishing there; there was a place for fishing in the spring of the year.

JOHN RHINER, on behalf of the intervenor, testified:

I have lived within two miles and a half north of Owl lake for thirty-one years. I am a farmer. When I first saw the lake on the south and east ends was a bank, good clear water running right up, and west pretty well around to the south and east, and then pretty well around to the west end, quite a ways around, was all bank; there is timber running right up to the lake and some of the trees bent over the clear water; and the north was some marshy and this wild rice; there was clear streaks of water still further north, and that whole north was pretty well in clear water, from 15 to 20 acres in spots; and them streaks came around to the main part of the lake. Up where the wild rice and rushes grew the water was all the way from four to five feet deep; some places not so deep and other places deeper. I have fished and boated a great many times in the lake. Have tipped over in the lake. My brother and I measured the depth of the water a great many times and found it all the way from seven to twenty feet deep in places. There wasn't much difference between the time I first saw the lake and when the first ditch was dug. I have measured the water where the wild rice grew and it would grow in water ten or twelve feet deep.

53 Cross-examination:

I was only six years old when I first saw this lake. We measured the depth with a string, when we were boating. When I became eight or ten years old, I commenced to hunt and trap and that was about all that I did. I was trapping muskrats around that time. The deepest water was on the northwest end pretty well. Norton's grove was west of Indian Grove. There was lots of open water north of Indian Grove at that time. The water came around and made a kind of island of rushes, with water seven or eight feet deep, about 80 rods to the north and west of Indian Grove. There was open water between Norton's grove and Indian Grove in spots. One spot would be about ten acres and another forty acres. It was so at all seasons of the year; I never saw it go down. We used to keep the boat hid in the rushes there to the north end. You could get clear up close to my place in the streaks with a boat. It was quite a ways to my place. It is a half mile from where I live to where I used to go with the boat. My land comes to the lake. I pastured down to the lake but there was too much water for anything to go there in the lake. There was one year when it got right dry, and while the stock never could get into the lake to pasture, they would cross over to the island some times. I never had or put a bar-way on the meander line before the ditch was cut. There is one there now. I think that they fenced that over right about after the lake was drained, and *and* it seems to me that was the time the gate was put there. The ditch was six or seven feet deep in the lake, and down at the outlet, it might have been ten or twelve feet deeper. That is the first ditch; I never have been there since the second was put in.

Redirect:

There was probably a quarter section of water in the old lake bed this spring (1896); sunk out after we came there.

Recross-examination:

54 I first saw the water this spring after those big rains; used to go by there often and saw it several times. It must have been there four weeks or more anyhow. The quarter of a section of water was not in one bunch, but in spots. A good part of the corn in the country had been planted a couple of weeks or more when I saw the water the last time.

HENRY RHINER, on behalf of the intervenor, testified:

I am brother of the last witness, am forty-five years old, live four miles from Owl lake, have known the lake since 1864; first lived three miles north of the lake. In early days, I saw the lake frequently; of late years, I haven't. Quite a while before it was drained I moved to Minnesota and from there to Wisconsin. I saw the lake for probably twenty years after 1864 every year. In 1864, the south part of the lake was all clear water; a kind of a bank on

the south; the timber grew right up to the edge of the water; the north of course was kind of marshy, wild rice and water plants, with water there all the same. There was clear water to the north in spots. I never measured the water anywhere myself; I have heard of fellows that had measured it. The timber on the south side extended about a half a mile or more. North of the island, there was clear water in spots. I have fished in the lake some and boated some, but not a great deal; my other brothers mostly. I could not see much difference in the lake in the twenty years, yes of course, toward the latter part, the rushes kind of grew up a little more, still the water was the same depth I think. There was not enough difference to speak of in the depth of the water between wet and dry seasons. The fish stayed in the lake the whole year. I know where they caught them in the winter, chopping through the ice and spearing them.

Cross-examination:

The open water extended further east than the timber. The wild rice and rushes in places were quite thick and reached over our heads when we were sitting in the boat. There was no
55 house in Indian Grove. I never was over on the west side of the lake. Rushes and wild grass grew to a height of two feet above the water to the south of Norton's place. I hunted muskrats north of Norton's place. Old Brookings lived about a mile south of Norton's on the south side of the lake, on the west end of the timber. There were bullrushes in places between Norton's and Brookings' places; there was water there just the same. South and southwest of Norton's there was slough, swamp or bullrushes. I do not remember seeing any grass straight south; it was mostly bullrushes. I have seen open water east of Norton's grove or a little south of east. When the water was high, or in the spring when the grass and rushes were low, I might have seen open water straight east of Norton's grove, but I do not remember of it, nor do I remember of seeing any open spaces north of Norton's grove. I had seen the lake very frequently.

Redirect:

Norton's grove was about 40 rods from north to south, and as near as I can remember, extended 40 rods west from the lake. When I said that it was marshy south of Norton's I meant that the water was not free from bullrushes, in contradistinction from open water. I guess the water was quiet deep south of Norton's grove. I should think that Brookings' place was a quarter of mile west of a point directly south of Norton's grove. There was water free from rushes and wild rice in the north part of the lake, north of Round grove, in high water. There was no clear water farther west than the west end of the timber on the south side of the lake. I did not trap muskrats on Owl lake, but on the outside of the lake. The muskrat-houses where I trapped them, were west of the lake, in the swamps and ponds.

M. DERST, on behalf of the intervenor, testified:

I have lived in Lake township about two miles east of southeast of Owl lake for the last fourteen years. I have known Owl
56 lake for twenty-one or twenty-two years. I first saw it in 1874, and there was quite a body of water there. I have fished in the lake in the spring of the year. I boated on the lake in 1874. The water was pretty deep and clear as far in as I went from the east toward the northwest. At that time the boat upset and I was in there and got the boat out. The water was over my head in places; I am five feet eight inches in height. I could not touch bottom where we upset. The bottom was such as to give us good footing as soon as we got to where we could touch, and seemed to be sandy. As far as I went up there on the north side, it was quite high banks along the little islands there; one place between the two islands there was no bank to amount to anything. One time I was there, one of the islands was entirely surrounded with water; there was nothing on it but brush and timber. At one time we drove over to the island; it seemed to be six or eight feet above the water. I saw the lake several times before it was drained and I cannot say that I saw much of any difference in the appearance or character of the lake from the first time I saw it.

Cross-examination:

At the time I went out in the boat, we went into the east of the timber. I went up west and we got quite a ways up north of the timber. It must have been half way between the two banks where we got into the water, and I think that we were about 30 rods north of the timber.

OLIVER NELSON, on behalf of the intervenor, testified:

I have lived in Norway township, a mile and three quarters from Owl lake, for about 23 years. I first saw the lake when I drove by in the summer of 1873. I have fished in the lake a few times. When I first saw the lake there was a body of water and timber on the south side; on the east shore there was no timber, that is straight east, but a little northeast there was a little grove. The south shore was quite high, and the east shore was a little high. The shore near Norton's place was not very high. There
57 was timber on Norton's place. Once in going over from the south side to Norton's place, we stuck down an oar and could not touch anything solid where we tried. The oar was about six feet long. I saw the lake every year and could see no difference in it until it was ditched. There may have been a little water towards the north end that was free from rushes.

Cross-examination:

There was open water on the south side where the timber was and it was quite a little ways from the shore. The lake extended east of the natural timber on the south 15 or 20 rods. I went on to the lake in a boat in 1874, along in May. The sloughs were gener-

ally pretty full of water at that time, but I do not remember that it was more wet than common that season. I went over to Norton's very frequently one winter on the ice. I did not see any open water east of Norton's grove. At times, when the water was high, there were little puddles on the east of Norton's grove, and a little around to the north. I do not know as I ever saw any open water north of Indian grove. I never saw any open water there unless it was in the spring before the grass came up. All west of Norton's grove used to grow up in wild grass and rushes. In the lake south of Norton's grove, there were coarse rushes but not much grass.

Redirect:

The grass I refer to is the coarse water grass and grew in the water. There was no ground visible on that part of the lake south of Norton's grove over toward Brookings. In the north end of the lake, the grass and rushes grew up through the water. East of Norton's there may have been clear water in the deep places where there wouldn't be anything growing.

FRED FARMER, on behalf of the intervenor, testified:

I first came to Lake township seventeen years ago, and have live-
where I now live, a mile and a half right west of Owl lake,
58 for thirteen years. The lake was about three-quarters of a
mile east and west and a mile north and south; a part of it clear water and a part grown up in rushes. The west and north sides were grown up to rushes. The clear water extended 60 to 80 rods east of the grass and rushes, and north from 90 to 100 rods. I have fished in the lake quite a few times, and have been swimming there. We found the water six or eight feet deep where we were swimming. I never took any measurements of the depth of the water in other places. On the east side, the bottom was sandy; if you got out beyond that there was soft matter, I wouldn't say whether it was moss or what it was. There was no change in the volume of water to speak of until the ditch was cut, except perhaps in dry seasons the water was lower.

Cross-examination:

I remember the circumstance of the first ditch being cut. It was cut at the outlet. I did not notice it particularly and cannot say how deep it was. I noticed that it was quite a shallow ditch on the outside; I don't know what it was at the lake. All that part of the lake directly south of Norton's grove to Brookings was marshy, grassy and reedy, and there was practically no open water directly east of Indian grove. It seems to me that there was some open water north. The place where we went swimming was 30 to 40 rods from what we called the southeast corner, and was toward the east end of the timber. I should not say that the bulk of the water was in that immediate neighborhood.

Recross-examination:

I meant that the west side of the lake was marshy, and by marshy, that the grass grows up in spots, more grass than rushes. There was no grass growing up through the water immediately south of Norton's except on the banks. There was water through on that line I referred to. If I remember right, I don't think that there were any rushes south of the outlet. The clear water extended as far north as Round grove (Indian grove) as they call it.

59 GEORGE A. WALLACE, on behalf of the intervenor, testified:

I lived on the edge of Owl lake, on the Bartholomew place, for three years prior to two years ago last spring, I was away three years and lived there three years before that. It was about eleven years ago I first moved onto the shores of the lake. I was up to the lake in June or July the year before it was ditched the first time, and that was the first time that I saw the lake. It looked like a lake and I should say that about half of it looked like it was clear. Rushes were growing on the west and north sides. They were growing right south of Norton's grove and west of Round grove. There were rushes growing in the north part of the lake with water thrown in—patches of rushes growing up in some places and then patches clear of rushes. The effect of the first ditch was to run out a good deal of water. After the first ditch was opened and the water had drained off, there was a pond right north of what we called Indian grove, then there was a pond up beyond further, up north of John Rhiner's. These were left after the first ditch was dug. I caught some fish in the lake when they were draining the lake with the last ditch. I caught the fish as they were going out and there seemed to be a good many of them.

Cross-examination:

I came to this country thirteen or fourteen years ago. When I first saw the lake it was before I moved there. We went over to look at the place, and ate our dinners in Round grove and went out boat-riding. I never saw any open water north of Round grove, but I never saw that part before the lake was ditched. Once in a while there was a strip of open water due west of the south corner of this grove, but further south it was clear. I saw a spot as large as this court-house right west from that around to Norton's where rushes didn't grow. I have been on the west shore and went over in a skiff. I am the Wallace that squatted on this land and the fellow that built a cottage up there.

60 A. D. BICKNELL, on behalf of the intervenor, testified:

Have lived in Humboldt for twenty years, and my business is the practice of law. I first saw Owl lake in August, 1862. I first approached a point on the west side about two miles from the timber on the south side. We then dug around on the prairie in the wet ground to the south side. From there we got a view of the lake. We estimated that there were a little over 300 acres of water

in sight. There were no rushes, or very few if any, in the lake. There were a good many rushes and quite tall on the north side where we first struck the lake and on the west. I saw the lake a number of times after that, and there was not much difference if any with its appearance as compared with the first time I saw it. The impression was about the same every time I saw it.

Cross-examination:

I crossed the lake once on the ice on horseback; was lost and wandered about for three or four hours. I do not remember of any permanent open water up north there except under the grass. I know about where the regular and natural outlet of the lake was. When we first went into the lake east of Norton's grove in 1862, we were in a lumber wagon and the grass and weeds, one thing and another, grew up as high as we were in the lumber wagon, as high as the top of the box, and the water was down there below three to six or eight inches deep. The water up to the north was not so permanently deep as to destroy all vegetation. I refer to sections 21 and 22.

O. F. AVERY, on behalf of the intervenor, testified:

I have lived in Humboldt county for 37 years. I first saw Owl lake in the winter of 1861. There were a good many rushes and grass in the north part, but I was not near enough to see whether it was slough grass. I passed the south part of the lake in going from the Boone river the next year. The bank was higher to the south side of
61 the lake. This was in the winter time and I saw quite a space of clear ice. The shore was well defined to the south and southeast. I first saw the lake when it was not frozen in 1879. There was quite an open space of water next to the timber in the south end of the lake. I had land there on both sides but could not get to the open water for the water where there was high grass. I tried both to walk and drive in. I owned the southeast quarter of the southeast quarter and the south half of the southeast quarter of the northeast quarter. The lake right west of my land, as far as I went, got deeper, but still it was heavy grass. In July or August, 1880 or 1881, I saw open water on the line between sections 21 and 22.

Cross-examination:

The nearest I got to the lake in 1861 and 1862 was at Bartholomew's place, near the east end of that timber on the south side of the lake. The distance might have been twenty rods; maybe more.

Intervenor rests.

GEORGE R. PEARSONS, on behalf of the plaintiffs, testified:

I own the land in controversy. I first saw all of Owl lake in 1869. I first hit the lake in the northeast corner and it was all reeds and rushes except a portion of it right near where John Bartholomew

lived near the southeast corner. So far as I could see from the trail, the upper part of the lake was pretty much all grass and reeds. There was a sand bank at the east end, and there was some clear water which continued in under the south timber perhaps sixty or seventy rods toward the west. West of the timber it was reeds and weeds. West of the Bartholomew house, the open water extended west thirty or maybe sixty rods, and north fifty or sixty rods. I saw the lake once or twice a year until 1884. In July, 1879, I noticed it was pretty nearly dry. The volume of water was
62 less, but the territory covered with grass and reeds was increased very little if any. It was very wet the year of 1869, and in October when I saw the lake first, the season was the wettest I have seen in Iowa. When I saw the lake in 1884, I had entered into the contract with the Fort Dodge and Fort Ridgley Railroad Company, of which company I was general manager. At this time, the volume of water was a little less than in 1869, but not a great deal, and there was a little more grass, reeds and bulrushes. In 1884 I became owner of the land and ran a capstan ditching machine from the sand bank a mile and three-quarters down the outlet. The ditch started south of the old outlet and was seven feet deep through the sand bank. The ditch at the edge of the lake was two and one-half feet below the level of the water at the edge of the lake. The ditch took out about all the water with the exception of perhaps 45 acres. Water was left on lots three and four in section twenty-seven and in the lake immediately adjoining those lots. It took all the surface water off the north end with the exception of two little ponds. Water was left west of lot three and north of lot four and some on lots three and four outside of the meander line and south. After the lake was drained we pastured the land. The stock overrun the whole of it except where it was the wettest. All of the water that was left was north of the west end of the grove on the south side of the lake; that grove was 200 rods long. The next thing in the nature of an improvement was the running of a big steam ditcher from a mile and three-quarters down the outlet to the lake in September, 1891, and completion of the ditch in August, 1892. I sold a part of that lake to Mr. Rood, and he was to do a certain amount of ditching in the upper end all in the lake; the lake was about four miles and a quarter. The ditch in the lake cost me *me* $2,860. In August, 1892, I set the lake afire and as quick as I could commenced plowing and have attempted to raise crops. It is all under cultivation with the exception of 125 acres, where Mr. Rood cuts his hay. Timothy was sowed there. When
63 ditching we found holes, burned-in holes, and the ashes and the burned roots of cattails and the holes would be found where they were burned. This was about forty rods northeast of the junction of the ditches in section twenty-seven. We found buffalo bones and horns scattered through the lake, and also the remains of a human being at the point above described.

Cross-examination:

I am a real-estate agent and live in Fort Dodge. In coming from Algona to Fort Dodge I did not cross or strike other lakes. When I first saw the lake I let the team walk the whole of the distance on the east side and south side. I had heard of the lake. I got within thirty feet of the water on the east side. At that time the water extended about forty rods east of the meander line. The water was high all over the country, being the highest we have ever had. Rood's house is on lot 10 in section 27 in what was called Round grove. The grove covers about forty acres and is inside the meander line. The trail that we passed along was on the high land, about fifteen feet above the lake, and I could see the whole of the lake proper. I didn't stop at all, simply drove on through. I had heard a good deal of Owl lake and took considerable pains to look at it as well as I could when my team was walking down the east side, and west along the south side. I saw the lake almost every year but had no purpose in examining it with reference to the depth or volume of water, or the extent of growth of rushes or reeds. I made measurements of the depth of water in 1884, and in that year it was substantially as before. The lake might have dried up a little and there may have been more reeds, weeds and bulrushes. The first ditch lowered the water about two and one-half feet. In 1891 and 1892 I dug a ditch six feet deep in the bottom of the first ditch, and it was six feet deep in the lake and extended into the lake. In the sand bank the ditch was fourteen feet deep for eighty feet. I extended a ditch six feet deep into the northern part of the lake. I
64 should say that the fall of this ditch from the northern part of the lake to the intersection of the ditch running southeast is two feet to the mile, but never had it leveled. The fall of the ditch southeast is a foot and one-half to the mile. The ditch in the lake is a little over four miles long. On the south side the banks are high, timber; the roots of the trees protected the banks and there were no slides there. The bank was ten to sixteen feet high; was abrupt in places, sloping in others. We found the ashes I referred to before setting the lake afire, but the bones and horns were found afterward. The ashes I referred to were from six to twelve inches below the surface in dead flags, reeds, and peat moss. The fire which we set out burned down from eight inches to a foot and a half.

Redirect examination:

The peat covered all the northern and western portions of the lake except a portion of it in the southwest corner, all the way from two to four feet deep. Seven-eighths of the lake was covered on an average to a depth of three feet. Commencing on the 23rd of May, 1896, it rained continuously for two days, and tumble weed had blown into the lake and into the ditch and formed little dams, until Rood and I built rafts and threw out those dams and let the water out. The water remained there about ten days.

OLE W. WILLIXSON, on behalf of the plaintiff-, testified:

I first saw Owl lake in the latter part of October, 1869; then lived five or six miles from the lake. I came in on the north of Norton's grove, which is on the west side of the lake, where I was going for wood, to the southwest point of the grove, from which point I could see the lake. I could not see any open water at all from that point. I saw open water from Indian grove and from the south side in April, 1870. The timber on the south side was from a half to three-quarters of a mile in length. The open water extended from the old outlet down west along the south bank and along the timber.

65 There was about a quarter of a section of open water without rushes or grass in it. There was a little timber about a half mile northwest of Indian grove on a little island like. The water got lower; hardly any water in July; almost dry in the outlet. The water would hardly come clear to the shore. In 1871 it was entirely dry at the outlet. In July and August of that year there wasn't more than eighty acres of open water, and it was covered with water lilies. I visited the lake frequently for four or five years and its condition was about the same. My business used to be that of a sailor. I have been out on the lake in a scow, and in the spring when the water was high, a fellow could get a good ways. In the middle of summer we could not get very far. I was out there once and we didn't get away from the shore at all; we poled away at places, ten-foot pole. We — out about thirty or forty rods which was as far as it was open. After that it was rushes or grass. It was about as dry that year as I have seen it.

Cross-examination:

In 1869 I didn't notice whether there was open water lying east of Norton's grove or not. The open water extended a few rods north of the outlet. In the spring of 1870 there were clear spots north of Norton's grove. I should think that the clear water extended along this south shore three-quarters of a mile and north from sixty to eighty rods.

G. S. FOSTER, on behalf of the plaintiff-, testified:

I have been county surveyor for three years, and have had four or five years' experience. The first time I was over on the lake was this spring. I was there last week and made a survey of the south side of the lake, lots three, four and five of section twenty-seven, assisted by Chas. Rood. He wanted to ascertain how much land was in the lots south of the lake shore at the present time. I measured the distance between the south line of section twenty-seven along the west side and between lots four and five and lots three and four to the lake shore. I did not find the southwest corner of section twenty-seven, had to locate it. I found the meander corner on the line between sections twenty-seven and twenty-eight.

66 The distance from the section corner to the meander line there was ten chains, forty rods; from the south line of the section to the lake between lots four and five was six chains and

fifteen links; along the east side of lot four, six chains and fifty links. Adjoining the lake shore in these lots was timber. The timber extends east of the east line of lot four from ten to twenty rods and is natural timber. The lake shore crosses the meander line at the old outlet. In lot four there are 12.65 acres; in lot five, 27.21 acres. The meander line runs in a northeasterly direction from a point ten chains north of the southwest corner of section twenty-seven, but the shore line actually runs in a southeasterly direction. The actual difference between the two lines on the line between lots three and four is sixty rods. The meander line on the north shore of the lake is right in the lake bed which is now under cultivation. I re-ran the meander line on the east side until it intersected the lake last March. It ran on the high ground sometimes closer to and sometimes further from the lake. To the east of where that little round island is, we were running on plowed ground and were about forty rods from the lake.

Cross-examination:

I started the survey from the southeast corner of section twenty-seven. There is a stone there that has the appearance of being a Government corner-stone. I did not do anything to verify the stone. I could not swear that I found the Government stake at the quarter corner. I found a stake on the section line. (Meander stake.) It looked like it had been placed there within the last few years. I did not find any pit. The original post was placed there in 1852 or 1853. The one I found is not necessarily the one that was placed by the Government. I tested it and found it to be as the Government said it was. I ran a line from the southeast corner of section twenty-seven through to the quarter post on the described line, and
67 measured from the southeast corner of section twenty-seven to the quarter post of section twenty-seven, and adopted the distance, locating the position of the southwest corner north and south. That is all the measuring I did. The banks are reasonably high, in some places twelve feet or over. The banks are dirt, but down along where the water washed, we found a few little niggerheads from six to eight inches in diameter. I do not pretend to say where the bank was in 1851. I have had no experience with the action of water and ice on lake shores more than driving around the country and noticing different places. I took my course in surveying at Ames.

O. H. KORSLUND, on behalf of the plaintiffs, testified:

I first saw Owl lake in the summer of 1874 from the east bank. There was quite a patch of clear water, free from grass or stuff, and it came right up to the south side. It looked off north of that timber like a marsh. Rushes grew there. I saw the lake again in about a year and its condition was about the same. I drove over to Indian grove where we left the team and went on foot to Norton's grove to get some grapes. Rushes, slough grass and wild grass was growing between the two groves. I wasn't looking around

and didn't see any open water to the north as I was crossing, nor to the south. I couldn't say how often I saw the lake after that; I know we used to sometimes go up there afterwards; that was after the first ditch was dug. The open water in 1874 went right up to the timber, up to the bank.

Cross-examination:

I saw the lake only once in 1874, and then it was all grown up and these wide leaves floated on top. It might have been clear in spots. I have seen it in the spring when it was clear water. The shore on the east side was sandy. At that time I didn't go along the shore for more than twenty or thirty rods. When we went to Norton's grove we went about sixty rods from Indian grove. The next time I was there was after they put the first ditch through. I signed an affidavit for Mr. Pearsons in this matter to send to the department.

68 JOHN BARTHOLOMEW, on behalf of the plaintiffs, testified: I have lived in Humboldt county since 1864, and owned a farm which joined Owl lake on the east and south. I first saw the lake in July, 1864; was then staying about three miles north of the lake in a wagon. We came in from the north side and wound around considerably on the west side in order to get around some big basins or sloughs. We crossed right where Norton built his corduroy bridge. Before we got into Norton's grove, I could see there were some high places and I could see south, and the timber on the south side of the lake. That timber now is about the same only it might have been shortened up a little at the ends. I do not think that there is any change in the south line of the Owl Lake tract. I could see water to the south and east of Norton's grove but not very much because of the grass and obstruction in the way. I do not know of any way to get to where the water was on that side. I couldn't see a very big spot of water, but there might have been water there that I didn't see. I could see that there was some clear water there at that time. That was in the month of July, 1864. In the winter when it froze up, I saw more ice than I could see at this time of water. I might have seen the grove southeast of Norton's at a distance, though I wasn't to it. I saw no open water to the east of Norton's grove at that time. North and east of Norton's grove I could see nothing but wire grass and rushes. I bought the grove and lots three, four and five to the south of the lake in 1866 and moved there in 1870. I built the house on the east end of the timber on lot three. The shore, from the meander post on the northwest corner of lot five, extends to the east bearing a little north of east. I saw Owl lake prior to 1870 when there was considerable water in it and I saw it when there was less water. There was quite a country that drained into the lake—all of the west and northern part. The Impassible marsh had an outlet in the head of the lake when it got high. The country way to the west of
69 Owl Lake tract was low, and discharged the water into Owl lake and these sloughs. Around the lake there was a good

deal of high land, but take it around too, there was low marshy places. We had to cross several inlets to get around to where we were in Norton's grove. There were inlets from the west and north. I think there was an inlet from the Impassible marsh on the southwest, but I think a great deal of the water went south in high water. It went both ways. There were two outlets to the lake. The main one was right east of Indian grove, north and east of my house, and right east of Rood's house. Where it crossed the sand bank would be a little south of east. There was a very marshy place on the line of sections 22 and 23 way up north that circled around and intersected the same outlet and some water flowed out there. The natural outlet was a stream in high water. The lake would stand about so when it was filled because of the rains, and it would come in and go out and keep about one thing for quite a while. When no water was flowing out of the outlet at the lake, there would be water flowing a little distance down toward the river and I suppose it was seepage from the lake. When the water ceased to flow in the outlet, the lake was probably a foot lower. In 1870, the lake was very high before the ice melted. In 1871 it got very low and the water would be three or four rods out from where the sand ridge was, and then it grew up to rushes, the most of it. There was open water, but it was grown up with rushes along through it. There was room to get around through with a boat. In low time, I don't think that there was any place where it was over two feet deep. We could wade around and get around considerable distance; we used to go across and get unto this bottom and go over into Norton's grove, but then we had quite a bottom there, and could walk across either way going through these weeds and grass. Where were open places, but we had to kind of go zigzag to get through. The bottom near the south side was covered with a mucky bad-smelling
70 stuff; on the east shore it was quite clean. Up to 1884 the water was up and down in the lake; when there was more water in the country, there was more water in the lake, and when the country would dry out, the lake would dry out, and the rushes would keep gaining.

Cross-examination:

There is quite a bayou on the southeast corner of section sixteen, and a ridge across south of it, and the meander line was south of the ridge. I heard folks say that there were deep places and tried to find them, but could not. I used to row over in a boat to Norton's grove, and in the summer of 1870 could get the boat about sixty rods from the grove. After the water quit going over the outlet, the water would fall about a foot from evaporation. Sometimes there would be pretty nearly full banks. There was an accumulation of reeds and things that washed in under the edge of the timber, that didn't smell very well. There were a good many of these pond-lily roots and some wood and logs laid in there that fell in there or cut in.

In an ordinary season, you wouldn't have found more than two

feet of water on the line from my house over to Norton's. I observed it in 1871 and 1872. I have been in places where the water came up to my breast. It would generally come up that high in the spring or the fore part of the summer. I have been in there when it would when the water was warm. I had a contract for the purchase of this lake, and put a fence around the lake. I threw up the contract in the spring of 1890. I sold out my interest in the lake and all the land I had at the lake, part of it — Mr. Pearsons. I signed an affidavit for Mr. Pearsons.

JOHN HARTWELL, on behalf of the intervenor, testified:

Have been a resident of Humboldt county for twenty-five years and lived on section ten in Lake township on the northeast quarter for ten years and a half. I first saw Owl lake in September, twenty-five or twenty-six years ago. I approached it from the east
71 end. It was a nice, clear, open body of water then. Mr. Bartholemew was living there at that time. The clear water extended from the corner of Norton's grove to the southeast toward Indian grove. It run, I should think, about square or about square with the west side of Norton's grove, and along on the edge there were floating bogs, or bogs that were loose; when you stepped on them, you were sure to fall in the water. I was at the lake almost every spring fishing, and there was plenty of fish in the lake. I have been out in the lake in a boat. There is a belt of water that made up to the north, and on either side was grass, rushes and wild rice extending quite a ways. The lake south of Mr. Rhiner's house was all under water at that time, yet I guess the weeds grew there when the water was off. During the ten years that I have lived there, the grass and weeds kept making toward the south every year, and when I last saw it, there wasn't much clear water on the south shore at all. There might have been eighty acres. From Indian grove over to Norton's on a straight line was principally under water. When they were ditching up toward John Rhiner's in June, it was all under water.

Cross-examination:

There seemed to be a ridge of high ground and sand in between Norton's grove and Indian grove. There were small spots of water clear from rushes between these groves. I have seen open water further north than that high ground. The spots were a rod or two wide and maybe ten or twelve rods long, and all be closed up with grass, and a little further there would be another one with grass between the two spots. Some call it wild rice.

Redirect:

The time I went across and found this high land about eighty rods east of Norton's grove was winter time, and I drove on the ice. I never saw any muskrat-houses in what is known as Owl lake.

72 WILLIAM THOMPSON, on behalf of the plaintiffs, testified:

Have lived in Humboldt twenty-eight years, and was at one time the county surveyor. First saw the lake in 1870 while riding along the south shore. We came to the lake on the southwest corner and I didn't think it was a lake really, but when we got on the east side we found considerable open water, but the west side was all grass and rushes. We went south of the timber. We drove into the timber twice, as far as we could, where there was an open place to get a view of the lake. We went east around the timber and then up the east side of the lake near the outlet. There was a spurt of sand beach there, or sand road. There was open water out quite a ways, clear open water with sand bottom as far out as we could see from that shore, and beyond that was grass, rushes and vegetation. I think it was in July. There was at least a quarter of a section of open water that was clear from vegetation. It was grassy around Indian grove. This grove is situated inside the meander line about forty rods west of it. I saw the lake nearly dry one time and very little water in the southeast corner. It was in September or early in the fall, in 1874, possibly. The greater part of the lake to the north and west was grown up to vegetation, and the area of the open water was probably one-half what it was the first time I saw it.

Cross-examination:

I was surveying section twenty six and ran the line clear to the lake along the south of section twenty-two, and it was west and north of that that I observed very little water and the lake grown up to rushes and reeds. I didn't go further south than the south line of section twenty-two, and didn't notice particularly how much water there was southeast. It was in the time of very little water. The first time I saw the lake there were quite prominent banks on the south and southwest. About half way over from the west where I first struck the lake, to the outlet, it was free from flags, and from the south shore the clear water extended probably a third
73 of the way to Norton's grove. Round grove was forty rods west of the meander line, and between it and the main land was a grassy marsh with a patch of open water in the center of it. It was connected at the north and the south with the other lake. There was a low place across the prairie, but my recollection is that it did not overflow except in high water. East of the meander line was high enough to cultivate.

SAMUEL LUND, on behalf of the plaintiffs, testified:

Have lived in Humboldt county eighteen years; first saw the lake in 1878, coming in from the south, in the east end of the grove. We drove down toward the lake and turned to the northeast and drove up on the sand bar that was on the east side, where we unhitched our horses and looked around. There was open water along the east shore from the outlet along the timber on the south shore. At the outlet it was twenty or thirty rods wide. It was wider right

where we unhitched at the southeast corner. The open water did not extend as far west as the west end of the timber continuously; there were small spots of open water where the rushes didn't seem to grow. North from the outlet it looked the same as to the west of there, but I didn't pay any attention to it. I was up several times each year until 1883. I noticed that sometimes the water was higher and sometimes lower at different times of the year. In September, 1878, the stage of water was about an average. In August or September, 1882, it was much dryer. We walked from the island across to the west grove. We had difficulty in walking, as there were some spots that were spongy like, and we had to look out and not get in between the edges because it was muddy. At that time perhaps a third of the open water which I saw in 1878, had disappeared from along the south side.

Cross-examination:

We drove through Indian grove to the little island beyond and then walked close to 100 rods west to get to the west grove.
74 It probably covers seven or eight acres; probably not that much. There was a grove northwest, I should judge about a mile from where we struck the lake. I am not accustomed to measuring distances on level water.

WILLIAM COX, on behalf of the plaintiff-, testified:

I have known Owl Lake since April, 1865, at which date I passed the lake. I went across to where the Bartholomew house is and took a look at the lake. I took one look at the lake and saw these large green leaves growing on top of the water in the southeast corner. The water was clear only for these leaves scattered here and there. I was eleven years old at the time. I have seen the lake very frequently and my recollection is that the open water began a trifle to the north of the outlet and then ran south around to the south side of the lake and extended part way west. I should judge the strip of open water was sixty or eighty rods wide. The rest of the surface was grown with these tall canes and black rushes. In the spring of the year the water would be high, and in the summer it would be all sloughs. I went down there to swim once, and couldn't even get a circle of water. I was south of what was known as Norton's grove, and went out from there from thirty to sixty rods and dug down with my hand. It was one of the first years that I came out here. I think it was in 1865. I was eleven years old. I remember of being nearly choked for water and I couldn't get any till I got back. The sloughs were all dried up. I went to Norton's grove for wood. It is marshy and some black wet spots in all of these inlets. There are a great many sloughs and marshes through Lake township. Since the putting in of the big ditch in the lake we can get water off up above now.

Cross-examination:

I own 240 acres in section twenty-one. There is a low place running up to the southeast quarter of section twenty-one, which
75 has been drained. There is a chain of sloughs running up there, but not a ditch. The whole territory has become dryer by reason of draining this lake. The sloughs running into the lake are dryer because there is no back water there. I moved on the place in 1885. Up to 1870 I saw the lake a good many times from the northeast, from Norton's grove when I was foraging for wood. I think there was about forty acres in the grove. The time I tried to get a drink was one of the first times I came out here. I should judge where I tried to get a drink was about fifty or sixty rods west of the southeast corner of section twenty-one. I couldn't see any open water if there was any there. The leaves that floated seemed to me to be dead. One hundred and fifty-one acres of the quarter that I bought from Pearsons is dry land and nine acres of this is all lake land. I got a warranty deed from him for the 160 acres, as I understand it.

Mr. MICHAELSON, on behalf of the plaintiff-, testified:

I have lived in Lake township thirty years. I first saw Owl lake fourteen years ago last spring. We went on the south side of the lake and stopped near the sand bar. We stayed pretty near all night in Bartholomew's barn; went over to fish. When I struck the west side of the lake, the opening that is out of the Impassible swamp and lake at the west end of the south grove, it didn't look to me like a lake. We drove along the timber until we got to the east side and then saw clear water. All west of the timber was this rough-looking moss. There was quite a body of clear water perfectly clear for a few rods along the beach and sandy bottom, and further back there was that kind of little, slim green stuff. I was in the lake swimming and got that green stuff around my legs. I should judge the clear space was about thirty or forty rods wide extending west from the sand bar.

Cross-examination:

The greatest width of Norton's grove from east to west is fifty or sixty rods, and it extends north and south a little over 160
76 rods. I caught some bullheads in the lake; was fishing from the sandy beach. Clear water extended about a fourth or a fifth of the way to Norton's grove, and pretty nearly up to Indian grove.

OLE HALGRIMS, on behalf of the plaintiffs, testified:

I first saw Owl lake in 1873, in the middle of the summer. I stood on the sand bank and looked toward the northwest. I was there ten or fifteen minutes. I saw some clear water and some covered with rushes. The southeast portion of it was open. It kind of looked to me as more than half the main lake, the clear water I would call it. I couldn't say how wide the open water in the widest

place was. It looked to me like there was about ten acres of open water; it might be a good deal more, but I should say about ten acres. I cannot tell when was the lowest stage of water, I didn't take much fancy to that lake. I do not recall ever seeing it lower that it was the first time I saw it. I did not see the lake very often, and did not visit any other portion of the lake; only drove past. In driving on the west you have to drive quite a ways from it because it is so swampy and you can't drive close to it.

Cross-examination:

I lived six miles from the lake. I should think that there was about a section of land in the lake. The strip of open water looked to me to be sixty or seventy rods long east and west. I didn't look very far to see north and south. I am not very much accustomed to measure level distances. I do not know what was north of Indian grove. I would not pretend to say that there wasn't even three hundred acres of clear water in that entire section. I don't know how much there was. That was the lowest I ever saw the water.

JOHN JOHNSON, on behalf of the plaintiffs, testified:

I have lived in Humboldt county forty years last spring. I saw Owl lake first in August, 1856. I had heard there was a lake,
77 and went over to see it. I struck the lake a little northwest of the south timber, and after I got as near as I could to it—it was all grown up in rushes, grass, and weeds, and everything—we didn't think there was much of a lake but we could see a little clear water to the southeast corner. We went around the southeast corner and there was a strip of clear water, it might have been thirty or forty rods from the north to the east shore, and it might have run sixty or eighty rods west, but it grew narrower to the west. There might have been ten or fifteen acres there, perhaps in part of this wild lilies grew; it was quite low at the time I saw it. There was clear water only in places, and that was along the southeast where there was a little beach or sand bar. Fifteen or twenty rods from the shore, the pond lilies grew up. I do not think there were over eight or ten acres where there was nothing growing. I saw the lake again in 1875 and there was not much difference; might have been a little more water than when I first saw it. On the southeast corner it was perhaps three or four rods down to the water's edge.

Cross-examination:

I didn't see any clear water up north, but didn't go up there. I think if I recollect right, August of 1856 was reasonably dry. I think about one-sixth of the distance from where I stood and the timber on the northwest was open water.

J. W. FOSTER, on behalf of the plaintiffs, testified:

I first visited the lake in the summer of 1866 on my way to Goldfield. I approached the lake from the west and struck it at the

southwest corner near where the Brookings place now is, a few rods west of the south side timber. All I could see from that point, was vegetable matter growing like a marsh. I was traveling along the road passing between the lake and the marsh south of it. I have been to the lake on the west side, but never on the east side. We visited some timber on the west side, getting into it over a sort of corduroy bridge. From that point it looked to me like a
78 large marsh. I only visited the west side once and I think that was in 1879. There is a body of timber east of Brookings' place which cuts off the view from the road. I never saw any open water. I never went nearer to the lake than these two times I have stated.

Cross examination:

My recollection is that the corduroy bridge ran nearly east and west, and connected what I called an island with the higher ground on the west. Norton's grove seemed to me to be an island. I have been around the north end but not close to the lake. When I was at Norton's grove in 1869, I do not recollect whether I could see over to the Bartholomew grove or not. John Johnson and I made affidavits in this case, which were submitted to the governor.

ROBERT J. JOHNSTON, on behalf of the plaintiffs, testified:

I have lived in Humboldt county for forty years, but when I first came was just a little baby. I do not remember much about Owl lake until 1872 or 1873, when I was sixteen or seventeen years old. Father used to buy cattle and herded them around the lake, and I have been around the lake frequently in the summer months, from May to September. The first time I remember seeing the lake was when I went up the west side of the lake with Henry Rhiner; we went out somewhere near where George James lived on the south shore, swung around a big marsh and was looking at the lake. We then circled out around about a mile and came back and looked on the north end and there was a swampy place where the water ran through. All we saw except where we looked across the timber, was covered with grass and rushes. We saw some clear water off towards the timber. I have been at the southeast corner and have seen open water from forty to sixty rods wide. My recollection is that there was not much difference in the open water at the
79 various times I visited the lake. Sometimes when the lake was higher it would be a little larger, but there was always them spaces that I have since learned was sand bottom, that was open. Up about the outlet it was marshy and covered with weeds and rushes.

Cross-examination:

When Henry Rhiner and I circled around in going up the west side, we came back to the water north of Norton's grove. The low places up north had muskrat-houses in them. We could see clear water when we were crossing over to Rhiner's. I think the clear

water might have laid along the south side 100 to 120 rods. I am the same Johnston whose affidavit was filed with the governor.

N. R. JONES, on behalf of the plaintiffs, testified:

I have resided in Humboldt county since 1873. I first saw Owl lake in 1871. When I was out from Indiana in September of that year, Frank Boyd took my father and me to Bass lake in Weaver township to get some water lilies for my wife and we drove up close to the lake without seeing any water and we joked Frank a good deal about it, and he said he would take us up in a day or two and show us a lake, take us to Owl lake. We took one or two of the little boys and when we got in sight of the timber, he said, "There is Owl Lake timber out there." We drove near Brookings and saw nothing but grass waving in the winds. We drove past where Mr. Bartholomew lived to the southeast corner and saw some open water extending to the outlet in the shape of a new moon. I don't think there were five acres of open water, and it was pretty muddy and it looked like another week of that kind of weather would dry it up. There was a spot in which there was no vegetation. North of there as far as I could see from the high ground it looked as if it was all rushes, cattails and large grass. There was no water north of the outlet and lots of vegetation. We didn't cross the outlet. From the outlet over to the grove on the west was a marsh. The year
1871 was a dry season. I never saw the lake lower than that
80 until it was drained out. I have been all around the lake.
The year 1881 was a very wet year and there was quite a good deal more water there than in 1871. In 1883, it was not so wet, and in going around the lake then it gave me less outs and ins than in 1881. I have seen lots of muskrat-houses in that tract. There is a good deal of low land, with dry ridges, around the lake, extending up into Vernon township. The draining of the lake has added from ten to twenty dollars an acre to half the township.

Cross-examination:

It was in September, 1871, when — was at the lake. My attention was called to the muskrat-houses because we were to be shown such a nice fine lake and we found it a swamp and bog full of muskrat-houses, and we didn't think it was a lake at all. Prior to the time it was drained, I never saw the lake when I didn't see clear water. The water was the lowest in 1871. In the spring of the year, the clear water would extend much further north. I made an affidavit for Mr. Pearsons.

F. F. FRENCH, on behalf of the plaintiffs, testified:

I have lived here since the spring of 1868, and I first saw Owl lake in August of that year. It was a pretty dry season at that time of year. I passed by the northeast corner of the lake near what is called Indian grove. I wasn't near the southeast corner and saw no water at that time; wasn't close enough to see any water. It looked more like a marsh from the distance I was. I

could see the grove on the west side across half or three-quarters of a mile. Between there was a good deal of low marshy land. I saw the timber on the south but did not notice any open water down that direction. I used to pass the lake frequently in going to Fort Dodge. In the spring of 1870, I was at the north end of the lake and it seemed to be all a body of water. That season was very wet. There was very little vegetation to be seen at that time. The sloughs generally were full of water at that time. I went to
81 the south end in the summer and was surprised in not finding so much water as I supposed. At that time, there was quite a body of water running from the east end fully up to the south side. If it was running at the outlet at all, it was not running very full for it was grown up to large coarse grass. In 1872, I think, there was very little water to be seen. In 1873 I remember going by and seeing a fish-house on the ice. I made a hole in the ice and looked down. Although I didn't measure it, I thought the water was two feet and a half deep, and was surprised at it being so shallow for I had asked a man the depth a day or two before and he said it was five or six feet. The house was seven or eight rods from the bank. I have noticed muskrat-houses on the north and west parts of the lake.

Cross-examination:

In going by the lake in 1868, I was too low to get a view of anything but the northeast corner, and I could only see the outlines. I could not tell what was between me and the groves, and I was not in position where I could see the south end of the lake at all. There might possibly have been more than forty or fifty acres of clear water along the south side. I made an affidavit for Mr. Pearsons.

GEORGE H. SHELLENBERGER, on behalf of the plaintiffs, testified: I am a lawyer and since 1872, with the exception of one year, have lived in Humboldt county. I first saw the lake in 1876. I drove from the west and past the lake on the south, in going to Goldfield, but did not stop. You could see no water from the west. The open water extended a few rods beyond the outlet on the east, and a few rods west of the east end of the timber on the south. I poled out in a boat in 1878. There were water-lily leaves on the surface of the water and further out bulrushes, and beyond they were thicker so it was not possible to run a boat there. The water was about the same height as when I first saw it. I think
82 the deepest place I saw was not over eighteen inches or two feet. From where the water had receded on the south side was sort of muddy, on the east gravel, and on the west a mire deposit. North and west seemed to me to be covered with rushes, grass and weeds. I didn't try to push the boat into the rushes or grass very far for it was hard work. I visited the lake once every year until 1882 and I don't recollect very much difference in its appearance.

Cross-examination:

All I saw of the lake the first time was from the road to Goldfield. The next time, two years later, we had some girls along and were having a pretty good time, and I wasn't making any estimate of the land which was covered with water. I didn't go in to see whether there was water among the rushes and reeds.

F. F. FRENCH, recalled on behalf of the plaintiffs, testified:

In 1878 or 1879, the water had receded so that I didn't see any open water at all; it was the lowest then that I had ever seen it. The bed of the lake was muddy, and the water was a little muddy. The area which I refer to now was located where the open water which I formerly saw was located.

Cross-examination:

The point I refer to was along the east side and south of Indian grove; right around the outlet, and from there south and west. It was late in the summer or early in the fall.

EDWIN O. ROOD, on behalf of the plaintiffs, testified:

My son and I are owners of a part of the territory embraced in the bed of Owl lake. I worked at draining and ditching there in 1891 and 1892. I first saw the tract in May or June, 1891, and came with the intention of bidding on the work for Mr. Pearson. I drove around the natural and artificial outlet and observed the amount of water and nature of the material we had to handle,
83 etc. Mr. Pearsons laid out the ditch, and I did the work. At the edge of the lake the ditch was intended to be six and one-half feet deep. We couldn't tell how deep the deepest depression was until after the water was out, because the water stood on the lake at the time we were ditching it. In June, 1892, we built a dam about half way between the section line between sections twenty-one and twenty-two and the main ditch which ran through the lake. Its purpose was to hold the water so that we could boat out coal to the machine; the dam held the water to the north side of the lake. Last year the depth of the ditch in the lowest part of the lake was three feet and a half. We have endeavored to maintain the opening at the outlet the same as it was constructed; we put plank in to keep the sand from coming in. The land has been cultivated two years. I recollect of water standing there last spring. The ditch had partially filled with tumble weed and impeded the speed of the water, and there were unusually heavy rains, and parties to the north and west of there had cut some large ditches and drained some portions in the lake, causing an unusual amount of water to come in at the same time.

Cross-examination:

My house is north of the outlet, in the north part of lot two, and inside the meander line I think. The dam I spoke of ran across

the ditch; was about thirty feet long and probably not more than two feet high above the berme. The ditcher was on rollers; we had a boat about sixteen feet long and four feet wide made of planks to hold our coal and the provisions of the men. We floated it over in the ditch. In 1892 we cut holes in the ice in different places. We found some places twenty-two inches deep. There hadn't been any perceptible change in the height of the water. We had opened a ditch at the outlet, but there was water running in. The deep ditch at the outlet was opened in December, 1891. There was more water in the spring of 1892 than there was in the fall of 1891. I
84 don't think there was open water except in three places in the northern part toward Rhiner's that was discernable outside of the moss; there was an accumulation of moss or roots that if you stepped upon it you would go down from six inches to a foot and a half into water. There was very little difference in the elevation between the points where the ditch went into the most northern part and the intersection of the north and south ditch with the main ditch. I cannot say whether the moss of which I spoke was alive or dead. It seemed to be formed of roots and decaying vegetation. In some places it was deeper than in others. Deeper, it seemed to be more rotted and was black. There was one place in the northern part in which there was none of this material. In the deepest places, we struck about four feet of this peat, and about one foot of clay. The peat appeared to be decayed vegetation and some of it to have undergone a hardening process. I should say that in 1896, about sixty acres of the land was covered with water. I am the same Rood that requested the governor to make application for a patent to this land.

Redirect examination:

I noticed vegetation in the water on the south side before I dug the ditch. It was a little plant with a leaf smaller than a pond lily which grows near the edge of the water and usually comes the first thing in the spring. It is about the first thing that starts in the spring and will grow as soon as anything will grow. It is common in this part of the country in that class of ground.

Recross-examination:

All of the seasons since I have known the lake have been dry except that of 1896. With the exception of a little piece — potatoes, we have not had a good crop off the lake bed.

Frank Bellows, on behalf of the plaintiffs, testified:

I am thirty-eight years old and have lived all my life, with the exception of two years, in Grove township, Humboldt county,
85 about five miles from the lake. In the summer of 1871, I was at Norton's grove repeatedly. We had our colt pasture or corral on that Norton's Grove island. From Norton's grove I have seen south and west, but I never saw any open water. There was a very heavy growth of cane brake probably ten feet high.

One Saturday when about sixteen years old, I went to skate starting from Mr. Brookings' house. About opposite Mr. Bartholomew's house, I put on my skates, and kind of walked on them until I got out to clear ice a little ways further. I could not skate with any pleasure because the ice was cracked to the bottom and there were a good many muskrat-houses. There was probably fifteen or twenty acres free from reeds or rushes. I have seen the lake when it was quite high, and when it was nearly dry. In the spring of 1880 or '81, the water was high and we took the boat from the river and went fishing there. It was about five feet deep in the deepest place. At one time the water was so low that in going into the lake from Bartholomew's we had to push the boat or scow for fifteen or twenty rods with boards, and then when we got out a little ways, we could use the oars and row and not pole the boat. The open space at that time was seventy-five or one hundred acres, but all along the shore by the Bartholomew house, it was so shallow and mossy it was impossible to row the boat. I used to be a surveyor; have surveyed repeatedly along south and east of the lake; have found the southwest corner of section twenty-seven. I surveyed from there to the bed of the lake and found the meander corner, and have surveyed along the south and east sides from that corner. The shore as you go eastward, bears south. Lots four and five are covered with timber, oak, linden and ash. The bank is broken and must be about ten feet high. I should say that the line of the timber is within a foot of where it was when I first saw it when I was a boy. I am positive the bank could not have receded since the Government survey was made. There was burr-oak timber there, a second growth.

86 Cross-examination:

I studied surveying at Humboldt college, although I didn't finish a course, and I really learned more of my father who is a practical surveyor. I must have been eight years old when I first saw the lake. The first time I was in Norton's grove was, I think, in 1871, and I was thirteen or fourteen years old. North of Brookings there was an inlet from a large slough. In some seasons of the year, it would be hard to tell from appearances where the lake line was on the west side. At the time I went skating, the muskrat-houses extended as far as I went out into the lake, one hundred rods. The clear ice was more to the east of that. The cane brakes which obstructed my view were north and east of the Brookings place close to the south shore.

PHILLIP C. HANNA, on behalf of the plaintiffs, testified:

I first saw Owl lake when I was about five years old. I was then living in Goldfield. My brother had a farm between the lake and Goldfield about three miles from the lake toward the Boone river. I visited the lake in 1878 or '79 for the purpose of fishing. I am quite certain it was the fore part of August, 1879. We went to the east end of the timber on the south side. The great body of the

swamp called Owl lake had gone dry except a very small amount at the south end. In the principal part of the swamp was no water; it was covered with a sort of mucky black mud and rushes and grasses were growing all through it. There was some water at the south end. My nephew had told me that when the river was up and the outlet was running, lots of fish had gone up the outlet into the lake and now it was nearly dry and we could dip them out. We went there for that purpose, but found that the fish had got beyond the biting point; they were dying and most of them worthless. I suppose there was less than an acre of actual water at the south end, but whether it went entirely dry after that, I am not able to say.

87 Cross-examination:

That season was quite a dry one. I have seen the lake when it was full, making a great sheet of water. We walked around the edge of the water, and failing to get fish, tried to shoot some ducks. The water had narrowed down in a sort of a hole quite a bit below the natural bed of the slough.

A. C. FAIRMAN, on behalf of the plaintiffs, testified:

I first saw the lake some time in the fall of 1869. I went to hunt or fish there with George Linder about the last of October in 1878 or '79. We drove along the east side and right along the timber on the south. We could not see any water from the west end of the timber, but when we got to the east end, we found a little water there. There was a little clear water right along the beach; we had a boat with us. We put it into the water and tried to go into the rushes with it. We tried to row out, but couldn't do it. It was full of pond lilies and we poled out thirty or forty rods to the rushes and tried to go through, but the water was so low, we gave it up and come back to the shore. To the mud, the water was eighteen inches to two feet, might possibly have been a little more. At that time there was no clear water that we could see. I was there the following year and found about the same stage of water.

L. R. BAKER, on behalf of the plaintiffs, testified:

I am clerk of the district court of Humboldt county. I first saw the lake in June, 1883. I was then living at Lu Verne, twelve or thirteen miles away, and had heard talk a good deal about Owl lake and I thought I would go down there and catch some fish, but I didn't catch any. I struck the lake at the northeast at a little grove, followed west until I came to another grove which I have since learned was Norton's. I went through the middle of it to the shore of the lake. I could see the timber on the south side and looked west and south but could not find any water. I looked for open water, for I could not fish very well on dry land.

88 Cross-examination:

It seemed to me that the whole surface of the lake, that low land, was covered with wild rice and grass and wide-bladed grass; that

grass in the slough I should think was from four to six feet high in some places. I don't know whether the reeds and rushes grew up so high as to obstruct my view, but I could see the bank on the ground where the timber was. I didn't go around to the east.

GEORGE R. PEARSONS, recalled on behalf of the plaintiffs, testified:

I cultivated some land on lot four in 1892, and in 1893 all the land south of the main ditch was planted to corn, mostly. The main ditch runs from the west side of the lake down to the outlet. No crops were raised on account of the frost in June. In 1894, all the land on section twenty-eight south of the ditch running east and west was planted to corn. Frost in July was the cause of failure that year. In 1895 the same territory was planted, and we raised about ten acres of wheat, and about fifteen acres of barley, but no other crops that I harvested. One hundred and sixty acres of it was corn and some oats, and there were probably one hundred and forty acres of barley. Early frost was the cause of the failure. A very little wheat was raised this last season on lot four outside of the meander line. Nothing inside of the meander line south of the ditch, with the exception of a few oats on lot three in section twenty-eight was raised there last season; it was all planted. All of the other part of the tract was cultivated and planted in wheat, potatoes, corn and oats. Four hundred bushels of barley which I raised south of the main ditch was all that I have ever raised in Owl lake.

Cross-examination:

My land extends north up to the ditch east and west on section twenty-seven, and not only the lake, but all of the northeast quarter of twenty-eight, and lots one, two, three, four, seven, eight,
89 nine and ten on the same section. I sold north of the lake on twenty-seven, and what was the lake that is on twenty-two, to Mr. Rood.

M. D. O'CONNELL, on behalf of the plaintiffs, testified:

I have been counsel for Mr. Pearsons and Mr. Rood in this litigation for nearly three years. I was present when the application that has been introduced in evidence was presented to the governor, and asked for a patent for the plaintiff in these actions. In the early part of 1895, I was in the governor's office, and he indicated to me that he would ask to have it patented. Mr. Pearsons was present also. I was representing them and acting for them before the governor, and as counsel presented the application accompanying the affidavit. The governor made an application to the Interior Department. It was in writing, for I saw it in Washington a few days after. I went to Washington at the request of the plaintiffs in these actions for the purpose of urging upon the department and Secretary of Interior and Commissioner of the General Land Office to take up and consider the application of the governor to have this tract patented to the State of Iowa. I called upon Commissioner Lamoreaux and Hoke Smith in relation to this matter, and asked them to act upon this matter, and knew of the

action that was being taken upon it, and the examination by the attorney general for the Land Department. I had the assistance of Congressman Dolliver of this district, and Senator Allison of this State, who acted at my request for and in the interests of the plaintiffs in this action. I was in Washington on this business about seven or eight days. The matter had then gone from the Commissioner of the General Land Office to the Secretary of the Interior, and it was pending before him when I left Washington. I went to Washington on the theory that this was swamp land, and acted for the plaintiffs, and relied upon the law authorizing the governor of Iowa to request the Secretary of the Interior to patent to the
90 State of Iowa all swamp lands at his request, and the request having been made by the governor, I went to Washington for the purpose of inducing and urging upon the Commissioner of the Land Office and Secretary of the Interior to act and decide and pass upon this question. I relied upon that being swamp land upon the official act of the governor in applying to the Secretary of the Interior to patent these lands; that is what induced me to go to Washington. I did nothing further after my return except to write the governor to know whether he had received a patent, and to act as their attorney in procuring injunctions to restrain the squatters from going upon this land. Mr. Pearsons paid me for my services and my expenses in Washington, and I remember that Mr. Dolliver was requested to return to Washington when he got as far home as Chicago, and I understood did return and urged action in the matter. This was at my advice. I know the expenses were paid, and I have knowledge of a draft being enclosed to Mr. Dolliver to defray his expense in the service of procuring a patent. I could not give the amount, but it was large enough to defray the expense, and was for that purpose. In my correspondence with the governor, I told him what had been done, and asked to have the patent issued from the State to the county, as soon as he received the patent from the General Government, and he informed me that it would be done, and afterward that it had been done.

Cross-examination:

I was employed for the purpose of securing the title to Owl lake for Mr. Pearsons and the plaintiffs to this action, and whatever act the governor did was upon my request and the showing made in these affidavits which have been introduced in evidence. So far as I know, it was all *ex parte*. All the action taken was on the theory that this was swamp land, and the governor would have a right to request a patent to issue. I didn't write the paper that the governor signed, but I was present and knew what was being done, and had something to say about it. It was done at my request,
91 and the letter of the governor was in the usual form. I went to Des Moines to see the governor to present this matter to induce him to take some action, and in going to Washington was acting in the same interest, of having a patent issue to this State as swamp land. I took it for granted that the land bordering on the

lake had been sold by the Government, because there were no public lands subject to entry in this county. My object in going to Washington was for the purpose of urging that action be taken at once, and I procured Congressman Dolliver and Senator Allison both to go with me for the same purpose. I have no knowledge of any examination having been made at any time either by the governor, the Land Commissioner or Interior Department in regard to the situation of Owl lake. At the time Mr. Dolliver went back to Washington he was not the son-in-law of Mr. Pearsons. I think the little matter of becoming son-in-law was arranged up at Spirit Lake the following summer. I think I can tell it wasn't contemplated at that time. I don't know but what this Owl Lake case may have started that case.

Mr. POPE, a witness on behalf of the intervenor, testified:

I came to this county in February, 1868, and I have been at Owl lake a number of times. I first saw the lake the same month I came here. My neighbor and I were looking for some land for a homestead. I went there the following June, and was around to the south side. There was considerable water where I was. I lived about five miles northwest, and used to go down very often for from five to eight years to fish. All the time I knew the lake I never saw any muskrat-houses on it, nor on the north side of the lake. I went with Arthur Doud for the purpose of spearing muskrats.

The intervenor introduced a copy of the book of original entries of the sales of lands which shows that the various lots and fractions of sections surrounding Owl lake were sold to various parties
92 from 1855 to 1858 by the General Government. Lot 2, section 27; lots 1, 2, 3 and 5, section 28, and lots 3 and 4, section 22, are indicated as swamp lands.

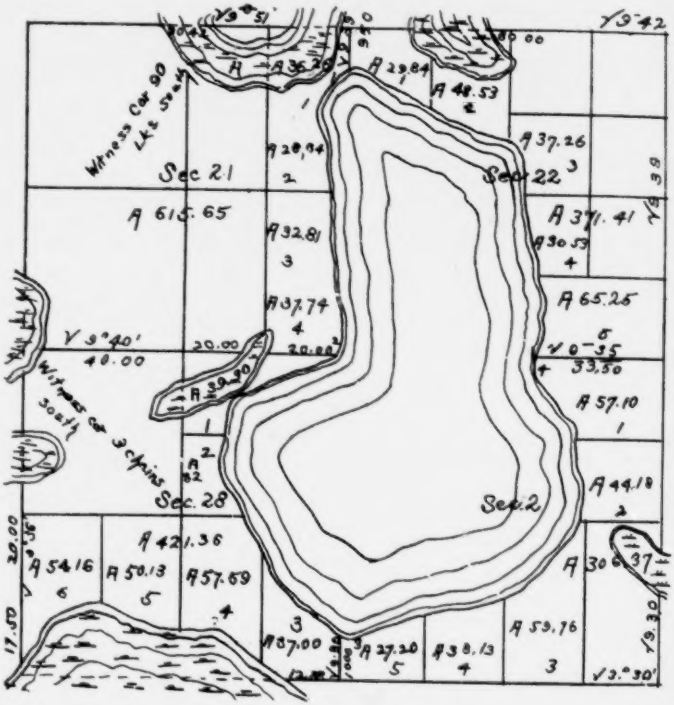
Exhibits.

The field-notes of township 92, range 27 west, as introduced as it appears on page 43 of this abstract, show the course of the meander line about the lake, and the distance from stake to stake. The notes show that one meander corner is at the corner of sections 21, 22, 27 and 28, and another on the line between sections 27 and 28. From this latter point the notes show that the line runs east of northeast about sixteen chains to "high banks covered with linn, walnut, ash and burr-oak timber, thence continuing in like course to the north further on for about forty-six chains to high bank, timbered with linn, walnut, elm, burr oak, gravel bed," and about thirteen chains leaving timber; thence north forty degrees west, eleven and one-half chains to "some marshy banks;" thence north twenty degrees west, nine chains and ten links to section line of 22 and 27. The line then runs around the north end with meander post on the line between sections 21 and 22; thence south along the west bank to place of beginning. The marsh designated "Impassible marsh" was also meandered, and said meander notes were introduced.

Plat of

SECTIONS 21, 22, 27 and 28,

Twp 32 Range 27 W 5th P.M



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Attached to the notes is an affidavit of William W. Smith, deputy surveyor, stating that the said notes are the true and original notes of the survey of township 92, range 27 west, and that said survey was made in strict conformity to the laws of the United States and the instructions of the surveyor general.

The instructions to surveyors were introduced. These instructions to surveyors as contained in the printed manual of instructions of Feb. 22, 1855, to surveyors general and their deputies, emanating from the General Land Office, after giving instructions to
93 meander all navigable streams and the method of meandering the same, embrace the following instruction: "Third. You are also to meander in manner aforesaid, all lakes and deep ponds of water of twenty-five acres and upwards; also navigable bayous; shallow ponds readily drained or likely to dry up are not to be meandered."

(Here follows blue print marked p. 93*a*.)

All parties rest.

And afterwards, on the 11th day of February, 1897, the court filed a decree and judgment dismissing intervenor's petition at intervenor's cost, and quieting the title in each case in the plaintiffs respectively, to which judgment and decree defendants and intervenor excepted at the time.

Hon. Lot Thomas, judge of the fourteenth judicial district, certified that the transcript of evidence with the attached exhibits, contained all the evidence introduced on the trial of said cause, and the evidence upon which said cause was tried, and that it contained all the objections made and rulings thereon, and he made said evidence a part of the record. The transcript of evidence with certificate and exhibits attached, was filed in the office of the clerk of the district court of Humboldt county by O. T. Gullixson, clerk, on April 20th, 1897, and within six months of the hearing of said cause and the rendition of judgment.

And afterward, on the — day of ——, 1897, and within six months after the decision of said cause by the said district court, the intervenor perfected its appeal by serving a notice of appeal upon the attorneys of record in the district court for the plaintiffs, upon the attorneys of record for the defendants, and upon O. T. Gullixson, clerk of the district court of Humboldt county, Iowa, and filed said notice of appeal with the clerk of the district court of Humboldt county, and secured the said clerk for the cost of a transcript.

The foregoing is a full, complete and true abstract of the record in this case and contains all the evidence offered or received on the trial thereof, together with objections to the evidence as
94 offered, the rulings of the court upon said objections, and the exceptions taken to said rulings as fully as the same appear of record.

MILTON REMLEY,
Attorney General, Attorney for Intervenor.

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99 And afterwards, on December 17th, 1897, and July 29th, 1898, respectively, there were filed in the office of said clerk appellees' amended abstract and second amended abstract, the same being in the words and figures following, to wit:

In the Supreme Court of Iowa, October Term, A. D. 1897.

EDWIN O. ROOD and CHAS. W. ROOD, Appellees,
vs.
GEORGE A. WALLACE, EMILY J. WALLACE, GEORGE S. WALLACE, and Mrs. George S. Wallace, Appellees; State of Iowa, Intervenor, Appellant.

GEORGE R. PEARSONS, Appellee,
vs.
A. F. JOHNSON and MRS. A. F. JOHNSON, Appellees; STATE OF Iowa, Intervenor, Appellant.

GEORGE R. PEARSONS, Appellee,
vs.
GEORGE A. WALLACE and EMILY J. WALLACE, Appellees; STATE of Iowa, Intervenor, Appellant.

EDWIN O. ROOD and CHAS. W. ROOD, Appellees,
vs.
B. D. BARRETT and MELINDA BARRETT, Appellees; STATE
100 of Iowa, Intervenor, Appellant.

EDWIN O. ROOD and CHAS. W. ROOD, Appellees,
vs.
JAMES O'CONNELL and MRS. JAMES O'CONNELL, Appellees; STATE of Iowa, Intervenor, Appellant.

Appealed from the district court of Humboldt county—Hon. Lot Thomas, judge.

R. M. Wright, Botsford, Healy & Healy, J. P. Dolliver, and M. D. O'Connel, attorneys for plaintiffs.

S. W. White, J. E. Mershon, Prouty, Coyle & Prouty, attorneys for defendants.

Milton Remley and W. L. Smith, attorneys for intervenor.

Appellees' Amendment to Abstract of Record.

Because the appellant's abstract is partial, defective, and unfair, the appellees George R. Pearsons, Edwin O. Rood, and Charles W. Rood file the following amendment to appellant's abstract:

On page 3 of Abstract the word "hereafter," the second word in the fourth paragraph of the petition, should be changed to "thereafter."

The word "at," the third word in the eleventh line of the second paragraph on page 12 of Abstract, should be changed to "etc."

The letter "L," in the signature of Peterson, near the bottom of page 13 of Abstract, should be changed to the letter "T,"

101 and after the word "secretary," on said page, insert the following:

And, whereas, said contract was duly and legally ratified and confirmed by the legal voters of said county at a special election duly called and held for that purpose on the 14th day of February, 1879,

And, whereas, said railroad company accepted the provisions of said contract in the manner and within the time prescribed therein,

And, whereas, the said Fort Dodge & Fort Ridgley Railroad Company has fully and completely performed that portion of said contract entitling it to one-half of said swamp and overflowed lands, proceeds, etc.,

And, whereas, the board of supervisors of said county of Humboldt, by resolution duly passed and spread upon their records, have authorized, empowered and directed B. H. Harkness as president of said board of supervisors, and Alex. McLaughlin, as auditor of said county, to execute a conveyance to said Fort Dodge & Fort Ridgley Railroad Company on behalf of said county, of the lands to which said Fort Dodge & Fort Ridgley Railroad Company is now entitled as aforesaid,

And, whereas, the said county and the said railroad company have selected and agreed in the manner specified in said contract upon the lands hereinafter described as the lands to which said railroad company is entitled at this time under said contract,

Now, therefore, in consideration of the premises and the

102 further sum of one dollar in hand paid the said County of Humboldt, in the State of Iowa, does hereby grant, bargain, sell, and convey unto the said Fort Dodge & Fort Ridgley Railroad Company the following-described premises situated in said county, to wit: The N. W. ¼ of N. W. ¼ of sec. 20, tp. 92, R. 27.

In witness whereof the said County of Humboldt has caused these presents to be signed by B. H. Harkness, chairman of the board of supervisors of said county, and the seal of said county to be hereunto affixed this third day of September, 1879.

THE COUNTY OF HUMBOLDT,
By B. H. HARKNESS,
Chairman of the Board of Supervisors of said County.

[L. S.] By ALEX. McLAUGHLIN,
County Auditor of said County.

STATE OF IOWA, } ss:
Humboldt County, }

On this 3rd day of September, 1879, before me, J. W. Foster, a notary public within and for said county, personally came B. H. Harkness, chairman of the board of supervisors of Humboldt county, Iowa, and personally known to me to be the chairman of the board of supervisors of Humboldt county, Iowa, and Alex. McLaughlin, county auditor of Humboldt county, Iowa, and personally known to me to be the county auditor of Humboldt Co., Iowa, and personally known to me to be the identical persons whose names are affixed to the above instrument, and acknowledged the execution of the same to be the voluntary act and deed of Humboldt County, Iowa, for the purposes therein expressed.

103 In testimony whereof I have hereunto subscribed my name and affixed my notarial seal on the date last above written.

J. W. FOSTER,

[L. S.] *Notary Public in and for Humboldt County, Iowa.*

The first exhibit set out on page 14 of Abstract should be Exhibit "C," and the second exhibit set out on said page should be Exhibit "D."

After the word "section," the last word in the second paragraph from the top of page 30 of Abstract, add the following:

And to which copy is attached the following certificate:

STATE OF IOWA, }
Office of Secretary of State. }

I, J. A. T. Hull, secretary of the State of Iowa, hereby certify that the foregoing are true and correct copies of plats of the Government surveys of the State of Iowa, in this office, of township- ninety-one, ninety-two, and ninety-three north, of range twenty-seven, twenty-eight, twenty nine, and thirty west, of the 5th P. M.

In testimony whereof I have hereunto set my hand and affixed the grand seal of the State of Iowa.

Done at Des Moines this 14th day of May, 1884.

J. A. T. HULL,
Secretary of State.
W. T. HAMMOND, *Deputy.*

Add to plaintiff's objection, on page 44 of Abstract, the following:

104 Authorized by the acts of the General Assembly of the State of Iowa, but no objection is made on account of the fact that the instructions now offered are not fully identified, but the said identification may be made later, and the further objection is made because the State is now estopped by its own acts in securing a patent from the United States and in making the patent to the county of Humboldt without in any way questioning the validity of the same or the character of the land described in said patent, or that the title to the same was not in the United States at the

time—that the former legal title was not in the United States—the application was made by the governor for said patent.

After the words "from east to west," in the thirteenth line from the top of page 45 of the Abstract, add the following:

But I couldn't tell anything about the depth. We first struck the lake on the northeast corner, and that was grown up to grass all along, and the north side, simply grass.

After the words "northeast," before the redirect examination, on page 45 of Abstract, add the following:

I don't think the open water showed from where I was to the northwest. You could see no open water whatever in the north. I think it was all covered up with brush and grass clear up to the north end of what was called Owl lake.

After the words "get across," in the 7th line from the bottom of page 46, add the following:

I was on horseback, and I thought I would go around the lake. It seemed marshy and low land.

105 After the words "quarter of section," near the centre of page 49 of Abstract, add the following:

That was the first time that I saw it.

After the words "water-course," in the next to the last line of page 49 of Abstract, add the following:

All the water in those ponds and sloughs to the west, northwest, the source of this so-called Owl lake, discharges through Owl lake into this outlet and down into the Boone river.

After the words "three feet," in the 4th line from the top of page 51 of Abstract, add the following:

Perhaps three feet, and it remained that way until they put in this big ditch, and that took all the water out.

After the word "banks," in the third line before cross-examination, on page 51 of Abstract, substitute the following:

There was an inlet from the northwest down in there and was from the west that run into the lake, and went around this that Norton grove, quite a body of water west, a marshy, sloughy place that went clear down into the lake.

* * * * * * *

Q. Was there a grove in between those inlets?

A. There was, west of the marsh; it was high ground and farming land west of there.

Q. In speaking of this northern part of the lake you say it is marshy. I'll ask whether all of it was covered with water.

A. I think it was.

After the word "cross-examination," on said page, add the following:

106 I couldn't give the exact date when I first saw Owl lake; it was some time during the summer of 1863 that I went over to the lake. I never had no idea of the month. This open water extends its largest length on the borders, and it was right next to the timber on the south side of the lake. I didn't go upon it at all.

After the words "the years," before the testimony of John Rhiner, on page 52 of Abstract, add the following:

Recross-examination:

That was at high water in the spring of the year.

After the word "deeper," in the 9th line from the bottom of page 52 of Abstract, add the following:

And the further out you go, there was spots where there was wire grass.

The words "with water seven or eight feet deep," in the 9th line from the top of page 53 of Abstract, should be stricken out, because the same does not appear in the transcript.

After the word "timber," in the 1st line of cross-examination, on page 54 of Abstract, insert the following:

The time when I fished there was shortly after I come here; after that I never did. I saw what they called wild rice growing there. I don't know what you would call it. I don't know as I knew it was wild rice.

After the word "lake," near the center of the first line on page 55 of Abstract, add the following:

I remember the marshes up northwest of the corduroy bridge that Norton made; also that wild rice that grew out east or south-
107 east of Norton's, in the lake. There was no open water there. It was rushes and wire grass. There was lots of wire grass—wild grass.

After the word "place," in the third line from the top of page 55 of Abstract, insert the following:

There was a marsh right straight south of Norton's house, where wild rice grew, for at least three-quarters of a mile.

After the words "Norton's place," near the last of the third line from the top of page 55 of Abstract, add the following:

Q. Did you hunt muskrats south?

A. It might have been south of Norton's grove; it might have been south. I don't remember that I ever hunted any muskrats. I might have hunted them west of Norton's grove; don't remember anything about it.

The following words, "There were bullrushes in places between Norton's and Brookings' places," in the fifth and sixth lines from the top of page 55 of Abstract, should be stricken out and the following inserted in lieu thereof:

All the country between south of Norton's grove until you got to Brookings was all swamp there; swamp and grass and clear spots through it; that is as I remember, along the timber there, pretty much clear water in spots. From Norton's grove clear down to the west end of the timber there was nothing there but marsh and wild grass growing until you got down near the timber on the south side.

The words "I have seen open water east of Norton's grove," in the 10th line from the top of page 55 of Abstract, should be stricken out and the following inserted in lieu thereof:

108 I don't remember that I ever saw any open water right straight east of Norton's grove clear of grass to where what was called the east side, from the first time that I went there.

The words "I mean that the water was free from the bullrushes in contradistinction from open water," in the fourth and fifth lines of redirect examination, on page 55 of Abstract, should be stricken out and the following inserted in lieu thereof:

Q. When you spoke of there being a marsh south of Norton's grove, what did you mean by that: you say marsh—what do you mean by that?

A. Where bullrushes grow.

Q. Do you mean to use that term in contradistinction from water free from bullrushes and grasses?

A. Yes, sir; where 'taint clear—that is, what I call bullrushes I call it marsh.

After the word "ditched," in the 5th line from the top of page 57 of Abstract, add the following:

At that time I don't know if there was any clear water free from rushes toward the north of it. There might have been some little spots. There was water enough to float a boat, and that is all.

After the words "Indian grove," in the fifth line from the bottom of cross-examination, on page 57 of Abstract, add the following:

It was kind of marshy in the swamp up there. I have never seen anything that I called wild rice growing in Humboldt county nor anything that I called wild rice growing in the lake.

After the word "grass," in the last line of cross-examination, on page 57 of Abstract, add the following:

109 There was never open water there. I don't know as I ever saw any open water further west than the west end of the timber there—that is, south of the lake—and north from the west end of that timber was wild grass and rushes and marsh, covered with wild grass and rushes right straight from the west end of the timber that was to the south of the lake. It was grown up with rushes and wild grass and was in 1874. I never saw the water any higher in that lake than it was in 1874. For the last seventeen years I have lived about a mile and a quarter from the east side of this lake, and I would drive by there once in a while; wasn't very often. I would go up or down the lake.

The words "we found the water six or eight feet deep when we were in swimming," in the sixth and seventh and eighth lines from the top of page 58 of Abstract, should be stricken out and the following inserted in lieu thereof:

Q. How deep did you find the water where you were swimming?

A. I think the deepest spot was from six to eight feet.

After the word "north," the first word in the ninth line of cross-examination, on page 58 of Abstract, add the following:

If there was any open water it was there in little patches.

After the word "neighborhood," in the last line of cross-examination, on page 58 of Abstract, add the following:

I couldn't say whether the water was any deeper further off than

it was there or any shallower. The bulk of the open water was right around in that neighborhood there. I know where the west line of the timber is there on the south side of the lake.

110 From Norton's grove south to that point there was no open water; it had those rushes and reeds in, but none that you would call open water on up to Norton's grove right down to the west end of the grove, so to the south end of the lake.

The words "recross-examination," on page 58 of Abstract, should be changed to "redirect examination."

At the bottom of page 59 of Abstract add:

Recross-examination:

Q. We understand you to say that all that part of the lake directly south of Norton's grove, across to the west end of the grove, on the south side of the lake, was grown up with reeds and rushes?

A. Yes, sir.

After the words "cross-examination," on page 59 of the Abstract, add the following:

The fish came up from the bottom of the river and through this outlet in high water in the spring. We caught the fish in the spring. In the spring they were coming up, and in the fall they would go back there. We caught them between Mr. James' there and along until that ditch.

After words "fourteen years ago," in the first line of cross-examination, on page 59 of Abstract, add the following:

I lived on Mr. Pearsons' land for a time. I rented it. I can't tell you what year it was. It was two years ago. I don't know whether you call it Mr. Pearsons' tenant or not. I bought the land of him and it went back. I never saw the north part of the lake before the first ditch was put in.

111 After the words "the first time I saw it," in the next to the last line of direct examination of the witness A. D. Bicknell, on page 60 of Abstract, add the following: I think that the last time that I saw the lake was in '73 or '74.

After the words "know where the outlet of the lake was," in the fifth line of cross-examination, on page 60 of Abstract, add the following:

I don't remember of seeing any open water up north of there; it was all grown up with wild rice and this black sort of bullrushes. I have seen great bodies of water thereabouts; I supposed it was a slough; it was in high water; that was to the north of this grove, on the east side, that I speak of. I never saw any open water only in case of rains, that I remember of.

After the word "deep," in the third line from the bottom of cross-examination, on page 60 of Abstract, add the following:

I don't remember of ever seeing any permanent water up there, in that part of the country, in the north part of this so-called Owl lake. I have no recollection of seeing any open water in that part of Owl lake that is located on sections twenty-one and twenty-two.

After the words "sixty rods," in the third line from the bottom of page 61 of Abstract, add the following:

There was grass there. The character of the surface was reeds and grass, cattails, bullrushes, and weeds.

The words "covered with grass and reeds was increased very little, if any," the first line on page 62 of Abstract, should be stricken out and the following inserted in lieu thereof:

112 Covered by grass and reeds about the same—little more if anything. That was in October, 1869. It was a very wet season. I saw the lake in 1879, in the summer time; perhaps July. When I saw the lake in October, 1869, it was terribly wet, the wettest I have ever seen in Iowa, and I went to Algona, and the bridges were washed out and the creeks high, and I made out to get up there, and in order to save coming through the creeks, in coming home the river road, I went around by this lake for the purpose of avoiding washed-out bridges.

After the word "south," in the seventeenth line from the bottom of page 62 of Abstract, insert the following:

I became acquainted with Mr. Rhiner's location in 1884. In July, 1884, with Mr. Hess and other men, I meandered the lake, the whole of it, and on the north end of this meander line I found a fence built very near the meander line. At the extreme northern part of that lake, as represented on the map, was a barway. Mr. Rhiner's pasture joined that meander line and that barway was used to let in cattle and stock into the lake. I noticed that the ground was traveled as much as the average pasture on the farms in this country.

After the words "was sowed there," in the last line of page 62 of Abstract, insert the following:

The lake had been dry before, entirely dry, totally dry, and that was shown to Mr. Rood and me on the machine.

After the words "miles long," in the fifth line from the top of page 64 of Abstract, add the following:

The ditch is a mile and three-quarters down to the outlet, and that fall is eight feet and nine-tenths. Mr. Hess took the level

113 and I was with him.

After the words "three feet," the last words in the fourth line of redirect examination, on page 64 of Abstract, add the following:

I cut a ditch through it once, on section 28, where the ditch comes in from the marsh into the lake. I cut it for 35 rods and had to put men on planks and cut it through with hay knives and throw it out with pitchforks.

The words "in July and August of that year there wasn't more than eighty acres of open water and it was covered with water lillies," beginning in the fifth line from the top of page 55 of Abstract, should be stricken out and the following inserted in lieu thereof:

In July and August, 1871, there wasn't more than five acres of water and that water was right along from the north edge of the north line of the timber down west to about straight north of Stanley's old place and about half a mile west from the east point of the timber, and I should judge about forty rods from the shore

south of Norton's grove and south of Round grove. I couldn't say that there had been eighty acres covered with water. That was covered with these water lillies. There wasn't very many feet of open water that showed; it wasn't many feet of clear water at the sand bank.

After the words "was about the same," in the eighth line from the top of page 65 of Abstract, add the following:

In the summer of 1872, in August, the lake was, as I have stated, covered with water lillies, and the water had sunk down so
114 that there was nothing to seed, only you come out in muck and soft mud; but sometimes, after heavy rains, you know, we used to bathe there, but we all kept ourselves along the south shore and that sand bank east from John Bartholomew's grove. I couldn't say that there was any water anywhere else, only along the south shore, in 1872 and 1873. You couldn't see any water anywhere, only right down along the shore there and then up toward the Brooking place, east of the old Brooking place, and north of Stanley's. In that summer I was familiar with the condition of things in the north part of the lake and went across it for wood—across on the north side of Norton's grove, over on the northwest side. There was no open water then east of Norton's grove at all; it was grown up in slough grass. I continued to see this lake for about four or five years, up to 1875 or 1876; the condition of it seemed to be about the same.

The cross-examination of the witness, Ole W. Willixson, as set out on page 65 of Abstract, should be stricken from the abstract and the following inserted in lieu thereof:

There was no open water extending in a line between Norton's grove and Indian grove; only rushes. The clear water came up a little north of the outlet, only a few rods; it was only a few rods from the outlet west that the clear water extended. I cannot answer how many rods. In the spring of 1870, during the high water in the month of May, the whole country looked like a lake—about half of Lake township. There was no clear water north of Norton's grove, so you couldn't see the rushes; there were some clear
115 spots. There was no clear spots free from rushes up to the north end of the lake. Was up there in March or April, 1870, and we tried to get a road across to see if we could get across with the oxen, but the oxen couldn't go across because we were afraid there might be air-holes. There was ice in between the edges and there was moss in the larger part. I saw the lake all that summer, mostly, on and off. The clear water extended from the south shore north free from rushes; not outside of sixty or eighty rods. There wasn't only a narrow place at east shore and that extended clear water up to the outlet and extended about three-quarters of a mile along the south bank. During the summer of 1870 the water changed down to nearly nothing on the west down to this time. The water free from reeds and rushes couldn't be over thirty or forty rods from the old grove—from the north end of the grove up along towards the outlet, along the sand bar—and couldn't have been over ten rods north and south. We were working there.

We tried to bathe in there. We couldn't get out to get a bath unless we wanted to go in muck—in rushes—outside of eight or ten rods. There was water in the slough up north of Owl lake during the summer of 1870—lots of it.

Twenty-seven and $\frac{31}{100}$ acres, as set out in the ninth line from the top of page 66 of Abstract, should be changed to sixteen and $\frac{15}{100}$ acres.

After the word "cultivation," in the 16th line from the top of page 66 of Abstract, add the following:

Plaintiff offers in evidence Exhibit "G," which is as follows:

116 (Exhibits "G" and "H," referred to in the transcript, are not set out on appellant's abstract, nor are they set out in this abstract, the appellee not being able to find the same or ascertain just what the same are.)

After the word "bank," in the second line of the testimony of the witness O. H. Korslund, page 67 of Abstract, add the following:

I came from the south and went east to Brookings' house, and then down to the bank east of there. I think it was after harvest. I didn't see much clear water there that looked like a lake. Quite a patch of water out in there; lots of grass grew in it; water lillies, with big green leaves, floated on the top.

After the word "grapes," in the eighth line of said testimony, insert the following:

The condition of the ground, as far as I went over to this grove on the east side of Norton's grove, it was grassy and wet; didn't have much trouble in walking across it.

After the word "south," in the eleventh line of said testimony, add:

Nor I didn't see any body of water to the south of me that was clear and free from rushes or weeds and grass.

After the words "thirty rods," in the sixth line of the cross-examination of said witness, add:

I could see out in the lake probably ten or fifteen rods. I don't believe it was clear water there; it was grass and this stuff growing up along the south side. It wasn't sandy; it was more mud there.

117 There were steep banks on the south side and the water came up close to the banks, and I didn't see any clear water on the south side. I struck out from the grove to where they call Norton's grove afoot and went west toward Norton's grove; didn't go around the lake. The rushes varied in height; some places they were higher and some places there was nothing but tall grass and slough grass and wire grass that they call it.

And at the bottom of page 67 of Abstract:

Redirect examination:

The first time we went over there—in the fall of 1874—some boys went with me to see the lake because we heard of it, and we went up to see it. That is all the business we had there. We didn't go in the swamp; we didn't think it fit; filled with grass. It was grassy and muddy and everything.

After the words "grass and rushes," in the eleventh line from the bottom of page 68 of Abstract, add the following:

I didn't see any open water there at all, in the northern part, in the fall of 1864 and summer of 1864. We came there in the following winter, after the ground was froze up, and hauled wood from Norton's grove. We set in, then, right straight from the north. I would say we went another course. We went in from the west side, and in winter we went right straight in from the north side. Then we crossed the marsh that runs east of the grove. We found this grass, and there had been a big snowstorm then and had thawed and kind of melted it, and we had ice with grass growing through it, and we had oxen, and we drove through right there on the ice, and they didn't slip because the grass protected
118 them. There was nothing to indicate any open water in the north part of this lake.

After the word "stuff," in the last line, on page 69 of Abstract, add the following:

That was always gathered in there. It was so thick that you could hardly draw a boat through it; quite a ways out, and on the southeast the bottom was always this quicksand. The bottom was quite clean at the east shore. There was an offensive smell from the lake which came from the bottom right next to the timber. I didn't see anything that would cause this smell unless it was the decayed stuff that had washed up against that shore there. There was a place for ducks and fowls came together there—laying around there.

After the words "kept gaining," the last word in the last line, before cross-examination, on page 70 of Abstract, add the following:

The deepest place - the water in this lake—to my mind, I would answer, after first letting out the water, showed the lowest spots west, a little north, I should say it was; right near north of my house, about the west line of three; right west of where we dug through the sand at the outlet. I think that was the only place in the lake that there was open water at that time, that the cattle could get water, and that was about 1886 or 1887. Two years, I think, it was dry; couldn't get water; it all dried up. That was the last resort to get water; then we had to take something else. That was after the first ditch was dug. The ditch was two feet and a half deep.

After the word "banks," in the ninth line of cross-examination, on page 70 of Abstract, add the following:

119 And then in the summer time dried out; go back two or four rods; somewhere along there.

After the first paragraph in cross-examination, on page 70 of Abstract, add the following:

Take it in an ordinary season, you couldn't have found more than two feet of water in a straight line from my house to Norton's. I observed this more than one year.

After the word "spots," in the last line of cross-examination, on page 71 of Abstract, add the following:

This slough grass; some, I think, call it wild rice.

After the word "corner," in the fifth line from the cross-examination, on page 72 of Abstract, add the following:

It was in September, early in the fall. I was doing some surveying there for Peter Storey, on the land in twenty-six, and we had to run the line to the lake shore. My recollection is that the lake was grown up to vegetation; that *it* didn't appear to be any water in sight. We were in plain view of it. We ran a line clear to the lake. My recollection is that there was no open water where that line was, the line between sections twenty-two and twenty-seven.

After the word "shore," in the seventh line in the direct examination of the witness Lund, on page 73 of Abstract, add the following:

Outside of that was rushes and cane, what we call bullrushes, and grows in large sloughs round that country, part of that next to the water—that is, generally sloughs that I was acquainted with. From the east line of the water at the outlet to the west line of the
120 open water was from twenty to thirty rods there.

After the word "wood," in the fourth line from cross-examination, on page 74 of Abstract, add the following:

We had a boat ride on the lake and out as far as those rushes. I should judge it was about thirty to forty rods from the east shore. We couldn't go any further; we tried it once and had to turn around. That was the second summer we were there.

After the word "water," in the ninth line in the examination of the witness Michaelson, page 75 of Abstract, insert the following:

The first thing we discovered on the surface, when we first struck the lake, was big tall rushes and what you might call cane. It (the surface) was nothing but this rough-looking moss.

After the word "west," the last word in the eighth line from the top of page 77 of Abstract, add the following:

But it looked as though it was all grown up to vegetation.

Add to the cross-examination of the witness Johnson, on page 77 of Abstract, the following:

I don't think that the clear water extended over one-sixth of the distance from where I stood to the timber; maybe not that. I think likely it was under that.

After the word "marsh," in the sixth line of the examination of the witness Foster, add the following:

I didn't see any open water.

After the word "lake," in the fifth line of cross-examination, on page 78 of Abstract, add the following:

The only view I got of the lake in 1866 was when we ran
121 into that part of the lake that was covered with rushes.

After the words "cross-examination," on page 79 of Abstract, add the following:

We followed the slough around and came back like toward the lake, probably half a mile north and south, and then we had to go around that swamp, then we came back into the lake again. There wasn't any lake shore up there; we came to the water. We came to the lake north of the grove known as Norton's grove. We found rushes there, all the north part was covered with rushes—the part

that looked off north. I suppose that is what you call Norton's grove, where the lake angles in there. I don't know by names where those places are.

After the word "winds," the last word in the thirteenth line from the bottom of page 79 of Abstract, add the following:

We didn't see any lake; we saw this swamp. Father called it a swamp. I kept down on the edge, and we drove down on the south edge of the lake to where Mr. Bartholomew lives.

After the words "open water," in the ninth line from the bottom of page 79 of Abstract, add the following:

But there was some mud that we came to, where there had been some water and lillies, lily pods, blue cane lillies, and pond lillies, and cattails, and weeds, and water grass.

After the words "cross-examination," on page 80 of Abstract, add the following:

I have seen the muskrat hills within forty rods of the south shore of the lake. I have seen them in every swamp we have got in this country. I saw the muskrat-houses all about the lake—saw them
122 in sections twenty-one and twenty-two, twenty-seven and twenty-eight. I saw them every time I went there in the proper season of the year, in the fall of the year. The first time I saw the muskrat-houses along there was in 1871.

After the word "north," in the last line of the testimony of the witness Jones, on page 80 of Abstract, add the following:

When I saw those muskrat hills in 1871 they were not all under water. Those hills were all along the lake there on the east side, quite a great many of them, and pretty close to the east shore, and extended as far up as Indian grove and extended clear across the lake, sprinkled all over it clear across to the other shore. We could see them from where we stood, where the grass was broken off and eaten away. I have seen muskrat-houses there up to the time the lake was drained, almost every time I went along.

After the word "lake," before cross-examination, on page 81 of Abstract, add the following:

I don't know where the limit of the lake was. The character of the ground that I saw was swampy and marshy. I saw muskrat-houses around the southeast part or probably the extreme west.

After the word "side," in the last line of cross-examination, on said page, add the following:

The first time that I saw the muskrat-houses I was at the north end; that was in the spring of 1869.

After the word "water," in the fifth line of the testimony of the witness Shellenberger, on page 81 of Abstract, add the following:

It appeared to me to be a large body of high rushes or cattails
123 and grass and something in the nature of a swamp, I should call it. Near the east end of the southeast corner there was a strip of open water running from that, as I saw it on that corner, in a northerly direction, or perhaps a little northeast. I know where the outlet is.

After the words "south side," in the fifth line from the bottom of page 81 of Abstract, add the following:

I have never measured it, and I should not say it was more than a few rods out where those rushes and grass and various things grew in the water. There was a body—not a very large body, doesn't seem to me now—of water that appeared to be practically open beyond that, and across from that, west and north, was this same matter, grass and rushes and so on, that I described on the west side. I couldn't say that I thought there was so many acres of open water. The impression came to me. I had heard the lake spoken of as Owl lake, and when I saw it I thought it was considerable of a joke to call it a lake. That was the impress[illegible] that came to my mind the first time I saw it. I don't know as I can give the number of acres, but there wasn't very many acres, I should not think.

The words "I poled out in a boat in 1878," in the fourth and fifth lines from the bottom of page 81 of Abstract, should be stricken out and the following inserted in lieu thereof:

In 1878 I was with a small party that went out there on a hunting expedition, and we stopped there and had dinner there; fed our team at Mr. Bartholomew's place. I think there was a man by the name of Russell living there then. There was a small board boat there, a skiff, and I was in that boat paddling around in the
124 open water on the southeast corner and pushing off a little toward the north there, and I remember that I wasn't far, not very many rods, from the shore on the south side until I came to rushes, or what I call bullrushes, and before that the water was covered a good deal with pond-lily leaves before getting to the rushes; very little open water—that is, open water without those pond lilies in it—and beyond that was bullrushes; came up there out of the water, and then thicker, so it wasn't possible to run a boat over there. I noticed the depth of the water. In leaving the shore with the boat I had to push off with a pole or board or whatever I had, and it was very shallow close to the shore, and out as far as I went I should say it wasn't over eighteen inches to two feet deep, the deepest place that I saw.

After the word "water," in the fifth line of cross-examination of the witness Shellenberger, on page 82 of Abstract, add the following:

I remember very distinctly the first impression I had at the time I saw the lake. You could see weeds. I came in from the west, but I could see a great deal of the west side of it.

After the word "etc.," at the bottom of page 82 of Abstract, add the following:

I have had previous experience in this work in Illinois, Indiana, Wisconsin, and also in Iowa.

After the words "ditching it," in the fifth line from the top of page 82 of Abstract, insert the following:

I took measurements of the ditch the next year after the
125 lake was drained, and we expected some places where the ditch had washed in from the outside where the bank was cut down entirely away, left openings, at Mr. Pearsons' request, for the water to run, and in these places the surface was of such a

character that it washed into the ditch, but through the lowest parts. The next season, after the ditch was cut and the water had run out, there were four feet of ditch in the lake.

After the word "lake," in the 10th line from the top of page 83 of Abstract, add the following:

There were places there where there was no vegetation growing, and we discovered the materials in these places that we were not familiar with, and as soon as the water was down I commenced to make examination, and decided from what I had observed in other places, compared with that what I found there, that them places had been burned out. The evidence we had of this was the materials we found there. There was a substance that floated to the surface of the water as I excavated the ditch, seemed light, and I couldn't decide what it was. It looked as though it had been burned black, and there was a substance that was of a different color than what I had ever found in a marsh, and what appeared to be—that is, we thought it ran with the water. It would wash in if we left the opening. It was light as ash and ash color mixed with dark vegetation. It formed a substance that I was not familiar with at all—never had found it in a marsh—and these things that were floating away, the most of them were nearly round, with a
126 stem practically black, and it appeared to be covered with a substance that looked like a coat of paint, perfectly black and hard; then there was something that resembled—well, it was generally flat and from two to four or five inches long, and was light and kept coming out and floating away in the ditch. After the water had gone down I went to see these places and made an examination and dug into the ground and found around the edges of these holes—I found what satisfied me that the holes were burned out. I found the remnants of what I called tortoise shells, or it was the bones and scales of a tortoise that appeared to be burned. It was exactly the same that I found after the fire we had a year later, and these substances that seemed floating was deposited from a few inches to several inches; that appeared to be ashes and roots of the vegetation down in the ground a foot or more were charred, and the same as charcoal appeared to be burned, and I also found these bulbs, or the bulbs that were floating. We afterwards examined the outside and they seemed to be covered with charcoal and the inside was sound.

After the words "coming in," in the fourteenth line of page 83 of Abstract, add the following:

We took a level last spring from the natural outlet down south, as near as we could judge. I had a transit, but I didn't use it for that purpose. We went due south from the main ditch and took a level. I don't think it was the lowest place in the lake. We went on a line south from the natural outlet. The result of the examination was that two feet and one inch was the greatest depression that we found. The land has been cultivated for two years. Last spring the whole tract was planted to onions, potatoes, and corn.
I recollect the water standing there. Last spring the deepest
127 portion of the lake bed was occupied by potatoes and onions. The deepest part of the lake bed lies just north and south of

the main ditch, and that we had planted with potatoes and onions. We had crates there last spring containing the seed potatoes. They were twelve inches and the thickness of lath. They were made of twelve-inch board cut square, and they were scattered over the tract in rows. There were none of them covered. The water extended up to and past the places where we took our levels. We completed the ditch in the spring of 1892. It was a wet spring, and the ditch took all the water away. We cut some hay off the upper end of this tract that same season. I don't think there was much done toward cultivating the land in 1893. My recollection is that Mr. Pearsons planted some corn, and we plowed or cultivated a deep place in 1893. Most of our work was done in 1894. In 1894 we did considerable toward cultivating, and in 1893 we leveled down the ditch dumps and put them under cultivation and did some plowing. In 1894 we must have had in the neighborhood of two hundred acres in the entire lake that was under cultivation. We had put in flax and corn and wheat and potatoes and millet, and in 1895 we had the entire tract, practically the entire amount of land east of the north and south ditch and south of the line of what I know as the section line between twenty-two and twenty-seven. We had about eighty acres of corn and we had wheat, millet, oats, potatoes, barley, and some tame grass. The reason for the water standing in the ditch this spring was our ditch was partly filled up with tumbling weeds that impeded the speed of the water.

Before the word "cross-examination," on page 83 of Abstract, add the following:

128 Plaintiff offers in evidence Exhibit "H," which said exhibit is as follows:

(Exhibits "G" and "H," referred to in the transcript, are not set out in appellant's abstract, nor are they set out in this abstract, the appellee not being able to find the same or ascertain just what the same are.)

After the words "redirect examination," on page 84 of Abstract, add the following:

The reason these crates or boxes didn't float was because none of them was covered with water and a portion of the weight was above the water. Most of them were empty; some had potatoes in them that were left where we were planting potatoes when the rains came on.

After the words "it was about five feet deep in the deepest place," in the sixteenth line from the top of page 85 of Abstract, add the following:

The deepest was five feet; not over that. I have been there again previous to that time. I couldn't say what year. I went over there with our hired man for the purpose of getting some fish. The Stanley boys had lived over there in the country north of there, known as the homestead; told the man that the lake had dried up. For that reason we went over there, thinking we could get some fish. We went to the south portion of the lake and along the sand bar, and it was very true that the water was nearly dried up, but we couldn't get out to where

the water was to find any fish if there was any there, and we went back without any fish at that time. I should judge about
129 forty rods, anyways, from the shore. There were geese and ducks paddling around in the mud and water. I ventured out as far as I dared to. It was six or seven rods, but the bottom was so shaky that I didn't care to go further and I made up my mind it was a fish story. It was quite a ways out there and I didn't think that water was very clear, because I could see in the puddles and patches that stood up on the bogs and looked quite large off that distance, and that was where a portion of what I afterwards learned was the deepest portion of the lake—the deepest that I knew of. Since the lake was drained I should say where I saw the geese and ducks was the lowest part, because there was no water any other place that we discovered, and there was perhaps a little out there. The ducks and geese was in it, but it was too far from shore to even shoot.

After the words "to row the boat," in the thirteenth line from the bottom of page 85 of Abstract, insert the following:

I will say that the first time I remember seeing the lake there was a great many rat-houses. I could count fifty, and if it hadn't been for the reeds and cane brakes, I could have counted a thousand.

Add to the bottom of page 87 of Abstract the following:

In the years 1891, 1892, 1893, I was United States consul to Venezuela. I was stationed at Laguayra.

After the word "water," in the second line from the top of page 87 of Abstract, add the following:

We didn't go clear up to the north part of the lake. As far as I could see up the bottom, it was dry.

130 After the words "shoot some ducks," in the fourth line from the top of page 87 of Abstract, add the following:

There were reeds pretty near the water and grass growing right down to the water's edge, slough grass. There was no water among the grass at that time.

After the testimony of the witness A. C. Fairman add:

Mr. Lund recalled on behalf of the plaintiff:

I have seen a number of muskrat-houses in what we called the lake, south of Rood's, or drawing a line through Rood's grove to this Norton grove. The tract south of that was what we always termed the lake, and on that tract I have seen a good many muskrat-houses. They were pretty much all over it. One year that I can remember of they were pretty much all over the west two-thirds of it. They were from fifteen to twenty rods apart. I have seen them there in two or three different years, in the same locality.

The words "I have no knowledge of any examination having been made at any time, either by the governor or the Land Commissioner, in regard to the situation of Owl lake," set out on page 91 of Abstract, should be stricken out and the following inserted in lieu thereof:

Q. Did you know of any examination having been made at any

time, either by the governor of this State or the Land Commissioner or Interior Department, in regard to the situation of Owl lake?

A. I have no knowledge on that subject.

WRIGHT & NUGENT,
Attorneys for Appellees Geo. R. Pearsons, Edwin O. Rood, and Chas. W. Rood.

131 In the Supreme Court of Iowa, October Term, A. D. 1897.

EDWIN O. ROOD and CHAS. W. ROOD, Appellees,
vs.
GEORGE A. WALLACE, EMILY J. WALLACE, GEORGE S. WALLACE, and Mrs. George S. Wallace, Appellees; State of Iowa, Intervenor, Appellant.

GEORGE R. PEARSONS, Appellee,
vs.
A. F. JOHNSON and MRS. A. F. JOHNSON, Appellees; STATE OF Iowa, Intervenor, Appellant.

GEORGE R. PEARSONS, Appellee,
vs.
GEORGE A. WALLACE and EMILY J. WALLACE, Appellees; STATE of Iowa, Intervenor, Appellant.

EDWIN O. ROOD and CHAS. W. ROOD, Appellees,
vs.
B. D. BARRETT and MELINDA BARRETT, Appellees; STATE OF Iowa, Intervenor, Appellant.

EDWIN O. ROOD and CHAS. W. ROOD, Appellees,
vs.
JAMES O'CONNELL and MRS. JAMES O'CONNELL, Appellees; STATE of Iowa, Intervenor, Appellant.

Appeal from the district court of Humboldt county—Hon. Lot Thomas, judge.

R. M. Wright, Botsford, Healy & Healy, J. P. Dolliver, and M. D. O'Connell, attorneys for plaintiff.

132 S. W. White, J. E. Mershon, Prouty, Coyle & Prouty, attorneys for defendants.

Milton Remley and W. L. Smith, attorneys for intervenor.

Appellees' Second Amendment to Abstract of Record.

The plaintiffs state:

That that portion of plaintiffs' amendment to abstract of record beginning on page 2 of the said amendment with the words:

"And whereas said contract was duly and legally ratified and confirmed by the legal voters of said county," and ending on the 4th page of said amendment with the words, "(L. S.), notary public in and for Humboldt county, Iowa." was attached to the petition in the case as a part of Exhibit "A."

The following words on page 4 of said amendment to abstract should go out, viz.: "The first exhibit set out on page 14 of Abstract should be Exhibit 'C,' and the second exhibit set out on said page should be Exhibit 'D.'"

The plaintiffs further amend the intervenor's abstract of record as follows: "The deed from Humboldt county, Iowa, to the Fort Dodge & Fort Ridgely Railroad Company, purporting to be set out on page 13 of the Abstract, was called Exhibit 'B' as attached to the pleadings, but when the deed of which Exhibit 'B' was a copy was offered in evidence, as stated on page 29 of the Abstract, it was identified and offered as Exhibit 'C,' and when set out in full is as follows:

133 EXHIBIT C (B).

Whereas, a contract was duly made and entered into on the eighth day of January, 1879, between the County of Humboldt, and State of Iowa, and the Fort Dodge & Fort Ridgely Railroad Company, duly organized and doing business under the laws of the State of Iowa, and whereas, said contract was duly and legally ratified and confirmed by the legal voters of said county on the 14th day of February, 1879, at a special election duly called, and held for that purpose, and

Whereas, said railroad company accepted the provisions of said contract in the manner and within the time described therein, and whereas, the Fort Dodge & Fort Ridgely Railroad Company has fully complied and completely performed said contract entitling it to all of said swamp and overflowed lands, indemnity lands, scrip and money, and

Whereas, the board of supervisors of Humboldt county by resolution duly passed and spread upon the records have authorized, and empowered and directed J. M. Sleicher, president of said board of supervisors, of Humboldt county, and Moses Hoover, auditor of said county, to execute a conveyance, to said Fort Dodge & Fort Ridgely Railroad Company on behalf of said company of the land to which said railroad company is now entitled as aforesaid:

Now, therefore, in consideration of the premises and the further sum of one dollar in hand paid to the said county of Humboldt and State of Iowa, said county does hereby grant, sell and convey to the Fort Dodge & Fort Ridgely Railroad Company, the following-described premises situated in the said county to wit:

134 The unsurveyed portions of sections twenty-one (21) twenty-two, (22) twenty-seven (27) and twenty-eight (28), in township ninety-two (92) north of range twenty-seven (27), west of the 5th P. M.; also the unsurveyed portions of sections eighteen, (18) nineteen (19) thirty-three (33) and thirty-four (34) in township ninety-one (91) north of range twenty-nine (29) west of the 5th P. M.

Also the unsurveyed portions of sections thirteen (13) and twenty-four (24) in township ninety-one (91) north of range thirty (30) west of the 5th P. M. in Humboldt county, Iowa.

Also the north half of the northeast quarter of section twenty-nine (29) in township ninety-three (93) north of range twenty-seven (27) west of the 5th P. M. Also the south half of the southwest quarter and the northeast quarter of the southeast quarter of section thirty-one (31) township ninety-three (93) range twenty-eight (28) west of the 5th P. M.

In witness whereof, the said County of Humboldt has caused these presents to be signed by J. M. Sleicher, chairman of the board of supervisors of said county of Humboldt, and the seal of said — to be hereunto affixed the 1st day of September, 1884.

J. M. SLEICHER,
Chairman Board of Supervisors of Humboldt County, Iowa.
[SEAL.] MOSES HOOVER,
County Auditor of Humboldt County, Iowa.

STATE OF IOWA, }
Humboldt County, } *ss:*

On the 1st day of September, A. D. 1884, before me, J. N.
135 Prouty, a notary public in and for Humboldt county, Iowa, personally came J. M. Sleicher, chairman of the board of supervisors of Humboldt county, Iowa, and Moses Hoover, county auditor of Humboldt county, Iowa, and personally known to me to be the chairman of the board of supervisors and auditor of Humboldt county, Iowa, personally known to me to be the identical persons whose names are affixed to the above instrument, and acknowledged the execution of the same to be the voluntary act and deed of Humboldt County, Iowa, for the purposes therein expressed.

In testimony whereof I have hereunto subscribed my name and notarial seal on the day last above written.

[L. S.] J. N. PROUTY,
Notary Public in and for Humboldt County, Iowa.

Filed Sept. 6, 1887, 4 o'clock p. m., Book 30, Deeds, p. 608, of records of Humboldt county, Iowa.

The deed from the Fort Dodge & Fort Rudgely Railroad Company to A. McBane, mentioned on page 14 of the Abstract as attached to the petition, was not identified as Exhibit "D," as stated, on page 14 of the Abstract, but was identified as Exhibit "C" (Ab., 4), but when offered in evidence was offered as Exhibit D, and is set out as follows:

Whereas the board of directors of the Fort Dodge & Fort Ridgely Railroad Company, on the second day of December, A. D. 1879, passed a resolution in words and figures, to wit:

Whereas, in and by a certain contract made and entered
136 into by and between C. C. Washburn and W. D. Washburn, parties of the first part, and the Fort Dodge & Fort Ridgely Railroad Company, party of the second part, bearing date of June seventh, 1879, for the construction by said first parties for certain considerations named in said contract of said railroad company of

said second party for such construction, on the following terms, to wit:

That as soon as said railroad shall be completed ready for operation, to a depot, between the villages of Humboldt and Dakota, in the county of Humboldt and State of Iowa, said first parties will by proper conveyance, convey to said second parties, or to such parties as they shall designate, all the right, title and interest of said first parties in and to all swamp lands, indemnity lands, scrip and money and all swamp-land interest of said Humboldt county which said county of Humboldt has by contract, bearing date the 8th day of January, 1879, contracted and agreed to convey to said second party; and

Whereas, said first parties have fully completed said railroad; and

Whereas, said second parties have designated A. McBane, of Fort Dodge, Iowa, as the person to whom they wish the conveyance thereof by second party to be made:

Now, therefore, be it resolved by the board of directors, that this company, to wit, the Fort Dodge & Fort Ridgely Railroad Company shall immediately convey to said A. McBane, by good and sufficient deed of quitclaim all right, title and interest of said corporation in and to the land and property in such conveyance described
137 and conveyed and the president and secretary of this corporation are hereby authorized and directed to make, execute and affix the corporate seal of this corporation to and deliver such conveyance to said A. McBane.

Now, therefore, the said Fort Dodge & Fort Ridgely Railroad Company in consideration of one dollar in hand paid, does hereby sell, convey and quitclaim, unto A. McBane of the city of Fort Dodge, Iowa, all its right, title and interest in and to the several tracts of land located in Humboldt county and State of Iowa and described as follows, to wit:

(Here follows the same description as is contained in the deed from Humboldt county to the railroad company as shown in preceding Exhibit C.)

In testimony whereof the Fort Dodge & Fort Ridgely Railroad Company has caused its corporate seal to be hereunto affixed and these presents to be signed and subscribed to by its president, at the city of Minneapolis, Minnesota, and by its secretary at the city of Fort Dodge, Iowa.

In presence of M. O. Hawkins.

FORT DODGE & FORT RIDGELY RAILROAD COMPANY,

[SEAL.] By JOHN MARTIN, *President.*

Attest: ISAAC GARMOE,

Secretary of Fort Dodge & Fort Ridgely Railroad Company.

138 STATE OF MINNESOTA, } ss:
County of Hennepin, }

Be it remembered that on this 15th day of December, A. D. 1884, before me, a notary public in and for said county, personally came John Martin, president of the Fort Dodge & Fort Ridgely Railroad Company, personally known to me, and acknowledged the execution of the foregoing instrument to be the voluntary act and deed of the Fort Dodge & Fort Ridgely Railroad Company and of himself as president thereof, as aforesaid.

In witness whereof I have hereunto subscribed my name and affixed my notarial seal the date first above mentioned.

M. P HAWKINS,
Notary Public, Hennepin Co., Minn.

STATE OF IOWA, } ss:
Webster County, }

Be it remembered that on this 17th day of December, A. D. 1884, before me, a notary public in and for Webster county, Iowa, personally came Isaac Garmoe, secretary of the Fort Dodge & Fort Ridgely Railroad Company, personally known to me, and acknowledged the execution of the foregoing instrument to be the voluntary act and deed of the Fort Dodge & Fort Ridgely Railroad Company and of himself as secretary thereof, as aforesaid.

In witness whereof I have hereunto subscribed my name and affixed my notarial seal the date last above mentioned.

EDWARD H. RICH,
[SEAL.] *Notary Public.*

Filed March 4th, 1885, 11 o'clock a. m., Book 34, p. 225, of records of Humboldt county, Iowa.

139 The deed from A. McBane to George R. Pearsons, in the pleadings (Ab., 4) called Exhibit "D" and mentioned on page 14 of the Abstract as Exhibit "C," was when offered in evidence identified and offered as Exhibit E, and when set out is as follows:

EXHIBIT E.

Know all men by these presents that *I*, Angus McBane and Elizabeth McBane, of the county of Webster and State of Iowa, in consideration of the sum of one dollar in hand paid do hereby forever quitclaim unto G. R. Pearsons, of Webster county, Iowa, all our right, title, and interest in and to the following-described land and premises situate and lying in the county of Humboldt and State of Iowa, to wit:

(Here follows same description as in Exhibit C, the deed from the county to the railroad company.)

And the said Elizabeth McBane releases all her right of dower in and to the above-described premises.

Witness our hands this the 19th day of December, 1884.

ANGUS McBANE.
ELIZABETH McBANE.

STATE OF IOWA, }
Webster County. }

On this 19th day of December, A. D. 1884, before me, the undersigned, a notary public in and for said county, appeared the above-name- Angus McBane and Elizabeth McBane, personally known to me to be the identical persons whose names are affixed to the foregoing instrument as grantors, and acknowledged the same to
140 be their voluntary act and deed for the purposes therein expressed.

In testimony whereof I have hereunto set my hand and notarial seal the date last above written.

JAMES B. WILLIAMS,
[SEAL.] *Notary Public in and for Webster County, Iowa*

Filed for record March 4th, 1885, at 11 o'clock a. m., and recorded in Book 34, p. 227, of records of Humboldt county, Iowa.

WRIGHT & NUGENT,
Attorneys for Plaintiffs and Appellees.

141 And at the January term, 1900, said cause was duly submitted to the supreme court of Iowa on the foregoing record, and the case having been fully considered, said court did, on the 26th day of May, 1899, file its written decision (opinion), the same being in the words and figures following, to wit:

ROOD ET AL.
vs.
WALLACE ET AL.

PEARSONS
vs.
JOHNSON ET AL.

SAME
vs.
WALLACE ET AL.

ROOD ET AL.
vs.
BARRETT ET AL.

SAME
vs.
O'CONNELL ET AL.

Appeal from district court, Humboldt county—Lot Thomas, judge.

These are controversies over about 800 acres of land lying in Humboldt county, Iowa, which was meandered by the original Government surveyors, and designated on the plat as "Owl lake." Plaintiffs claim title under act of Congress of September 28, 1850, commonly known as the "swamp-land grant." Defendants claim that the lands were unsurveyed lands belonging to the National Government and subject to entry under the homestead and pre-emption laws,
142 and that they entered upon and are in possession of the property for the purpose of making such entry. The State of Iowa intervened in each suit and claims that it owns the land in virtue of its right of sovereignty over the title to the bed of all lakes meandered by the General Government. The trial court quieted the title in plaintiffs, and the State appeals.

Affirmed.

Milton Remley, att'y gen., and W. L. Smith, for the State.

R. M. Wright, Botsford, Healy & Healy, and M. D. O'Connell, for plaintiff appellees.

S. W. White, J. E. Mershon, and Prouty, Coyle & Prouty, for defendant appellees.

DEEMER, *J.*:

The township in which the land in controversy is situated was surveyed and platted by the General Government in the fall of the year 1851. What was denominated upon the plat as "Owl lake" was meandered, and the land adjacent thereto was subdivided into regular and irregular tracts. Some of the lots were designated as "swamp lands," and all of the tracts surveyed were sold to various parties many years before this litigation began. At some places this lake had well-defined banks and shore lines, and at other places

it had no banks, but diverging into a slough or low, wet lands. It had some clear water, but, as a general rule, was filled with rank weeds, water lillies, and rushes. In the year 1884 plaintiffs dug a ditch which drained off much of the water, and in 1894
143 this ditch was deepened and widened, with the result that the land is now almost wholly fit for cultivation. In January of the year 1879, the county conveyed all of its remaining swamp lands to the Ft. Dodge & Ft. Ridgely Railroad Company. In 1895 plaintiffs, having previously obtained a title or claim of title to the land through certain mesne conveyances from Humboldt county and having drained the same, applied to the then governor to request the Land Commissioner of the United States Land Office to issue a patent for the land in controversy to the State under the act of Congress hitherto mentioned. The request was made and granted, and a patent was issued to the State. The governor thereupon issued a patent to the county under date of April 30, 1895. Humboldt county was not organized until January 15, 1857. The character of the so-called "lake" is a matter of much dispute. Some of the witnesses describe it as a shallow lake, while others say that it was marsh or swamp land. The State makes the following contentions regarding the ownership of the land: (1) That the lake beds of all meandered lakes and streams in the State belong to the State of Iowa, in trust for the public, by virtue of its sovereignty, and this right does not depend upon any act of Congress or grant from the United States; (2) that the survey of the public lands of the United States, the approval of such survey by the Land Commissioner of the United States and the Secretary of the Interior, and a sale of the lands under such survey fixes the status of the meandered lake and streams, except in cases of palpable mistake or fraud, beyond recall by any subsequent act of the Land Depart-
144 ment; (3) that the Land Commissioner of the United States Government had no authority by act of Congress or under the Constitution to patent to the State of Iowa any lake beds which had been meandered and were already the property of the State; (4) that the governor of the State of Iowa was unauthorized by any laws to request the Land Commissioner of the United States to issue a patent for the land in controversy, and hence the two patents, first from the United States to the State of Iowa and from the State of Iowa to Humboldt county, were wholly void.

We are quite ready to assume, as a general proposition, that the title to all the lake beds in the State, especially those of navigable lakes, is in the State, and that the General Government never had any control or ownership thereof. Indeed, this seems to be the almost unbroken voice of authority. Pollard's Lessee *v.* Hagan, 3 How., 212; Withers *v.* Buckley, 20 How., 92; Shively *v.* Bowlby, 152 U. S., 1; 14 Sup. Ct., 548; Mann *v.* Land Co., 153 U. S., 273; 14 Sup. Ct., 820; Knight *v.* Association, 142 U. S., 161; 12 Sup. Ct., 258; Illinois Cent. R. Co *v.* Illinois, 146 U. S., 387; 13 Sup. Ct., 110; Gunter *v.* Geary, 1 Cal., 463; Hinman *v.* Warren, 6 Or., 408; Haight *v.* City of Keokuk, 4 Iowa, 199; Hardin *v.* Jordan, 140 U. S., 371; 11 Sup. Ct., 808, 838; Veazie *v.* Moor, 14 How., 568; Noyes *v.* Collins, 92

Iowa, 566; 61 N. W., 250; Lamprey *v.* Metcalf (Minn.), 53 N. W., 1139. But when, how, and by whom is the question of whether the land is a lake bed to be determined? The attorney general contends that this is done at the time the original survey is made by the approval of the survey and the sale of the lands with reference thereto. At the time the original survey was made the following was one of the
145 rules promulgated for instruction of surveyors: "You are also to meander, in manner aforesaid, all lakes and deep ponds of the area of 25 acres and upwards; also navigable bayous, shallow ponds, readily drained or likely to dry up, are not to be meandered." Lester, Land Laws (ed. 1860), p. 714. And while the instructions require a plat of the township to be made designating swamp lands, streams, etc., and that the plats for the township be approved by the surveyor general, the Commissioner of the Land Office, and, in case of controversy, by the Secretary of the Interior, yet prior to April 17, 1879, it was not the practice of the Land Department to require any specific approval by the Commissioner of either the surveys or the plats. Tubbs *vs.* Wilhoit, 138 U. S., 142; 11 Sup. Ct., 279. Moreover, the requirement as to the approval was simply a rule of the department, which might be waived. It did not have statutory sanction. But suppose that the surveyor general and the Land Commissioner did approve the plat of the original survey, is this conclusive upon the parties? That question seems to be answered by our own cases. See Grant *v.* Hemphill, 92 Iowa, 218; 59 N. W., 263, and 60 N. W., 618; Bigelow *v.* Hoover, 85 Iowa, 161; 52 N. W., 124; Glenn *v.* Jeffrey, 75 Iowa, 20; 39 N. W., 160. In these cases the original survey was not given the force of an adjudication, but the fact as to the character of the land was determined by evidence alike. The Attorney General frankly concedes that the General Government may have a resurvey in case of fraud, palpable mistake, or for some other causes, but he contends no such resurvey can be made after the first survey has been approved and lots sold with reference thereto. No doubt this
146 is a general rule, but who may complain of this resurvey? Surely not the State; or if the General Government has power to order a resurvey because of mistake, it also has power to determine whether there has been a mistake. Purchasers of lots abutting on the meandered line or otherwise directly interested are, it seems to us, the only persons who may object to the resurvey, and no resurvey will be permitted which will in any manner prejudice their interests. They, as we have seen, are not made parties to this suit and are making no objection to plaintiffs' title. The case of Moore *vs.* Bobbins, 96 U. S., 530, and other like cases, relied on by appellant, relate to the power of the General Government over lands to which it has issued a patent, and it is there held that the functions of the executive department cease when the title has passed from the General Government. As to the power and right of the Secretary of the Interior to set aside a survey or to order unsurveyed lands surveyed, see Knight *v.* Association, 142 U. S., 161; 12 Sup. Ct., 258; Cragin *v.* Powell, 128 U. S., 691; 9 Sup. Ct., 203; Railroad Co. *v.* Butler, 159 U. S., 87; 15 Sup. Ct., 991. In the first

case it is said: "It is a well-settled rule of law that the power to make and correct surveys of the public lands belongs exclusively to the political department of the Government, and that the action of that department within the scope of its authority is unassailable in the courts except by a direct proceeding." Cragin *v.* Powell, 128 U. S., 691, 699; 9 Sup. Ct., 203, and cases cited. Under this rule it must be held that the action of the Land Department in determining that the Von Leicht survey correctly delineated the boundaries of the pueblo grant as established by the confirmation decree is binding in this court if the department had jurisdiction
147 and power to order that survey. It is claimed, however, and the referee so determined, that no such power or authority existed in the department, because it had been exhausted by the action of the Commissioner of the General Land Office in approving and confirming the Stratton survey in 1878. This contention is based upon the proposition that the Secretary of the Interior had no authority to set aside the order of the Commissioner approving and confirming the Stratton survey, especially in view of the fact that no appeal was taken from such order and the authorities of the city acquiesced in that survey. This proposition is unsound. We conclude on this branch of the case that the Secretary of the Interior had ample power to set aside the Stratton survey and order a new survey by Von Leicht, and that his action in such matter is unassailable in the courts in a collateral proceeding. The Von Leicht survey, therefore, must be held as a correct survey of the Pueblo claim as confirmed by the circuit court. Moreover, the method of running the shore line of the bay of San Francisco adopted by the Von Leicht survey was approved by the circuit court itself in Tripp *vs.* Spring, 5 Sawy., 209, Fed. Cas. No. 14180, and on this point we entertain no doubt. There seems to be no doubt that the Secretary of the Interior had the right, in so far as the parties to this suit are concerned, to redetermine the question as to whether or not the land in question was a part of the lake bed or was covered by the so-called "swamp-land act." And this brings us to the next question, What force is to be given the determina-
tion of the Land Commissioner that the land was in fact
148 swamp land, and what effect is to be given the patent issues to the State? That question seems to be answered by Rogers Locomotive Mach. Works *vs.* American Im-igrant Co., 134 U. S., 559; 17 Sup. Ct., 188. In that case it is held that a decisionof the Secretary of the Interior, to the effect that certain lands did not pass as swamps under the act of 1850, and the acceptance and transfer of them by the State was conclusive upon one who claimed title under the swamp-land act. Again, in French *v.* Fryan, 93 U.S., 169, that court said that "by the second section of the swamp-land act the power and duty devolved upon the Secretary of the Interior, as the head of the department which administered the affairs of public lands, of determining what lands were of the description granted by that act, and made his office the tribunal whose decision on that subject was to be controlling." See, also, as sustaining the same conclusion, Chandler *v.* Mining Co., 13 Sup. Ct., 798; McCor-

mick *v.* Hayes, 159 U. S., 332; 16 Sup. Ct., 37. In Steel *v.* Refining Co., 106 U. S., 447; 1 Sup. Ct., 389, we find this language: "That department, as we have repeatedly said, was established to supervise the various proceedings whereby a conveyance of title from the United States to portions of the public domain is obtained, and to see that the requirements of the different acts of Congress are fully complied with. Necessarily, therefore, it must consider and pass upon the qualifications of the applicant and the acts he is to perform to secure title, the nature of the land, and whether it is of the class open to sale. Its judgment upon these matters is that of a special tribunal, and is unassailable except by direct pro-
149 ceedings for its annulment or limitation." As the Land Department determined the lands in controversy to be swamp and issued its patent to the State accordingly, that determination is conclusive and the patent cannot be collaterally attacked. Steel *v.* Refining Co., *supra;* Wright *v.* Roseberry, 121 U. S., 488; 7 Sup. Ct., 985; Minter *v.* Crommelin, 18 How., 87.

The State further claims that plaintiffs have not made out their chain of title, in this: that they have not shown that the conveyance from the county to the Ft. Dodge Railroad Company was ratified by the vote of the people. It may be that the evidence on this point is insufficient, but the record does show that plaintiffs are in possession of the land under claim of title. The State intervened and asked relief against them. As they are in possession, and were at the time this suit was commenced, the intervenor must recover on the strength of its own title and not on the weakness of its adversaries. If the State has no title, its petition of intervention should be dismissed without regard to the title under which the plaintiffs claim. Their possession is a sufficient defense to the petition of intervention, for the State cannot rely upon title in a third person to defeat plaintiffs' recovery.

Lastly, it is said that the governor of the State had no authority to request the Land Commissioner to issue a patent for the land in controversy, and that the patent to the State and from the State to the county are void. His authority in the premises is conferred by act of the General Assembly passed January 25, 1855, which reads as follows: "The governor is hereby authorized to adopt
150 such measures as to him may seem expedient to provide for the selection of the swamp lands of this State, and to secure to the State the title to the same, and also for the selection in the name of the State of other lands in lieu of such swamp lands as may have been or may hereafter be entered with warrants." See Acts 5th Gen. Assem., c. 138, sec. 3. Whenever question arose as to the character of land such as that in dispute, it was certainly competent for the governor to submit the matter to the only authority that had original jurisdiction in the matter, and, having so submitted it, that decision is final. If there was no real dispute as to the character of the land—if, for instance, the property was a part of the bed of any of the navigable rivers of this State, or if it was property which was clearly lake bottom—it may be that the governor would not be justified in submitting the matter as to its character to

the Land Department, and if he did so, and the Land Department found that the land was swamp when surveyed, such conclusions would be null and of no effect; but when there is a fair dispute as to the character of the land when originally surveyed, surely the Land Department has the right to determine the dispute, and, as a general rule, its decision is binding until set aside by direct attack. The whole case, in our judgment, turns upon the effect to be given the original survey. If that is conclusive, it amounts to a segregation of the lakes and river beds from the public domain, and, as a general rule, confirms the title thereto in the State. If the survey is not conclusive, but is simply administrative or advisory,
151 then the Land Department has the right at some future day to determine its character and cause a patent to issue accordingly; and when this is done the finding is not subject to collateral attack. As has been said, we do not regard the original survey conclusive. There may be a resurvey, or an independent investigation as to the character of the land, and as a special tribunal is provided for that investigation, its determination is ordinarily conclusive. It follows from what has been said that the decree of the district court is correct, and it is affirmed.

152 The supreme court entered no judgment for costs, because the decision was adverse to the State of Iowa and a formal judgment may not be entered against the State; but the costs taxable under the statute in favor of appellees amount to the sum of one hundred twenty-five & $\frac{7}{100}$ dollars ($125.70), to be adjusted by the executive council or General Assembly, upon request of the appellee.

Afterwards a petition for rehearing was filed by counsel for the State of Iowa, and the same, having been fully considered, was overruled.

153 And afterwards there were filed in said clerk's office a petition for wit of error, writ, citation, and assignment of errors. The same are hereto attached in original form and made a part of the return to said writ, true and correct copies thereof being retained in the office of said clerk.

154 To the honorable chief justice of the supreme court of the Sate of Iowa:

Your petitioner, The State of Iowa, intervenor, conceiving itself aggrieved by the affirmance by the supreme court of the State of Iowa of the judgment entered against it in the district court of the State of Iowa in and for Humboldt county, in suits wherein Rood *et al. v.* Wallace *et al.*, Pierson *v.* Johnson *et al.*, Pierson *v.* Wallace *et al.*, Rood *et al. v.* Barrett *et al.* were the respective plaintiffs and defendants and your petitioner was intervenor in each of said cases, as set forth by the assignment of errors hereto attached and made part hereof, the opinion affirming said judgment having been filed in said supreme court on May 26th, 1899, prays that a writ of error

be allowed in said cause from the Supreme Court of the United States to the supreme court of Iowa.

MILTON REMLEY,
Attorney General, for the State of Iowa.

Filed Apr. 4, 1900.

C. T. JONES,
Clerk Supreme Court.

The writ of error prayed for is allowed.

G. S. ROBINSON,
Chief Justice of the Supreme Court of Iowa.

Des Moines, Ia., October 28, 1899.

155 Filed Apr. 4, 1900. C. T. Jones, clerk supreme court.

THE UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable judges of the supreme court of the State of Iowa, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court, before you, between Edwin O. Rood and Charles W. Rood, plaintiffs, and George A. Wallace, Emily J. Wallace, George S. Wallace, and Mrs. George S. Wallace, defendants, and The State of Iowa, intervenor, wherein was drawn in question a right or privilege set up or claimed under and by virtue of the laws and Constitution of the United States, and that the judgment of the said court was against such right or privilege so set up and claimed, as by their complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, and filed in the office of the clerk of the Supreme Court of the United States, on the first day of May, A. D. 1900, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and custom of the United States should be done.

Seal U. S. Circuit Court, Southern District Iowa.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, at Des Moines, in the southern district of Iowa, on the 31st day of March, A. D. 1900.

EDWARD R. MASON,
Clerk U. S. C. C., So. Dist. Iowa.

156 The United States of America to Edwin O. Rood, Charles W. Rood, George A. Wallace, Emily J. Wallace, George S. Wallace, and Mrs. George S. Wallace, Greeting:

You are hereby cited and admonished to be and appear in the Supreme Court of the United States, at the city of Washington, D. C., thirty days from and after the day this citation bears date, pursuant to writ of error filed in the clerk's office of the supreme court of Iowa, wherein The State of Iowa is plaintiff in error and you are defendants, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in said writ mentioned, should not be corrected and why speedy justice should not be done the parties in that behalf.

Witness the Honorable C. T. Granger, chief justice of the supreme court of Iowa, this 31st day of March, in the year of our Lord one thousand nine hundred.

C. T. GRANGER,
Chief Justice Supreme Court of Iowa.

[Endorsed:] Citation on appeal. Filed Apr. 4, 1900. C. T. Jones, clerk supreme court.

Due and legal service of the within citation is hereby accepted this 3rd day of April, 1900.

M. D. O'CONNELL,
J. P. DOLLIVER, AND
R. M. WRIGHT,
Att'ys for Pl'ffs.

157 *Assignment of Error.*

Now comes The State of Iowa, intervenor in the suit referred to in the attached petition for writ of error, by its attorney, Milton Remley, and says that in the record and proceedings had in the supreme court of the State of Iowa in said suit, in which it is appellant and Rood *et al.* are appellees, there is manifest error in this, to wit:

I.

The court erred in not holding that the lake beds of all the meandered lakes and streams in the State of Iowa belong to said State in trust for the public by virtue of its sovereignty, and that this right does not depend upon any act of Congress or grant from the United States.

II.

The court erred in holding that the survey of the public lands of the United States, the approval of such survey by the Land Commissioner of the United States and the Secretary of the Interior, and a sale of the lands under such survey did not fix the status of the meandered lakes and streams, except in cases of palpable mistake or fraud, beyond recall by any subsequent act of the Land Department.

III.

The court erred in not holding that the Land Commissioner of the United States Government had no authority by act of Congress or under the Constitution to patent to the State of Iowa any lake beds which had been meandered and were already the property of the State.

158 IV.

The court erred in holding that the Land Commissioner of the United States had authority to take jurisdiction of the lake beds and to reinvestigate the question after the lapse of forty-four years, and to issue a patent therefor, notwithstanding the alleged request of the governor so to do.

V.

The court erred in holding that the patent issued for unsurveyed lake beds in the State of Iowa could not be attacked or investigated by the courts; that the issuance of said patent was a finality, binding and conclusive upon the parties, especially the State of Iowa.

VI.

The court erred in holding that the Constitution of the United States and the acts of Congress prohibited the State of Iowa from questioning the legality of the acts of the Land Commissioner in taking cognizance of the lake in question, which had been segregated as a lake from the public lands of the United States in 1851, and issuing a patent therefor under the swamp-land act, and that the State was bound by the acts of the Land Commissioner in executing such patent.

VII.

The court erred in holding that the patent to the lake bed in question could not be attacked by the courts of the State, and that the same was final and conclusive as against the State.

Wherefore the said State of Iowa prays that the judgment of the supreme court of the State of Iowa be reversed.

MILTON REMLEY,
Attorney General.

159 STATE OF IOWA, *ss:*

I, C. T. Jones, clerk of the supreme court of Iowa, do hereby certify that the foregoing is a true and correct transcript of the record and proceedings, with all things concerning the same, as required by the writ of error herein.

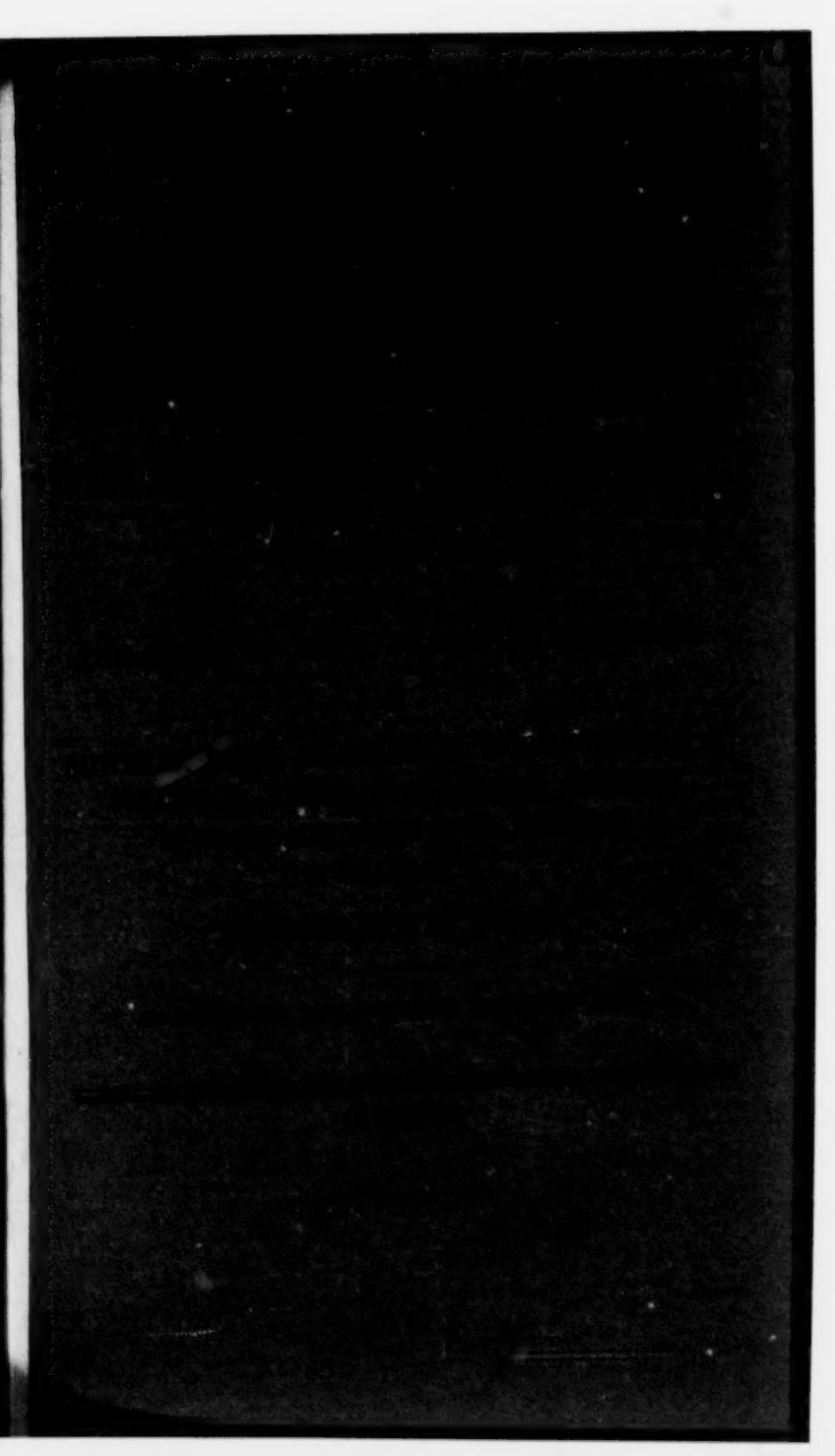
And I further certify that the petition for writ of error, writ, citation, and assignment of errors are hereto attached in original form as a part of this transcript, true and correct copies thereof being retained in my office, and this return is made in obedience to said writ.

In testimony whereof witness my signature and official seal, at Des Moines, Iowa, this 23rd day of April, A. D. 1900.

[Seal of the Supreme Court of Iowa.]

C. T. JONES,
Clerk Supreme Court of Iowa.

Endorsed on cover: File No., 17,738. Iowa supreme court. Term No., 265. The State of Iowa, plaintiff in error, *vs.* Edwin O. Rood, Charles W. Rood, George A. Wallace, Emily J. Wallace, George S. Wallace, and Mrs. George S. Wallace. Filed May 5th, 1900.



IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1901.

Term Number 52.

THE STATE OF IOWA, PLAINTIFF IN ERROR,

vs.

EDWIN O. ROOD, CHARLES W. ROOD, GEORGE A. WALLACE, EMILY J. WALLACE, GEORGE S. WALLACE, AND MRS. GEORGE S. WALLACE,

DEFENDANTS IN ERROR.

IN ERROR TO THE SUPREME COURT OF IOWA.

BRIEF AND ARGUMENT OF PLAINTIFF IN ERROR.

BRIEF UPON MOTION TO DISMISS WRIT OF ERROR.

STATEMENT OF THE CASE.

In addition to the facts set forth in the motion to dismiss writ of error by the defendant in error, we submit the following:

The controversy in this case is as to the title of the land which constituted the lake bed what is known as Owl Lake in Humboldt County, Iowa.

Suits in equity were brought by Edwin O. Rood and Charles W. Rood against George A. Wallace, Emily J. Wallace, George S. Wallace and Mrs. George S. Wallace, by George R. Pearsons against A. F. Johnson and Mrs. A. F. Johnson, by George R. Pearsons against George A Wallace and Emily J. Wallace, by Edwin O. Rood and Charles W. Rood against B. D. Barrett and Melinda Barrett, and by Edwin O. Rood and Charles W. Rood against James O'Connell and Mrs. James O'Connell, claiming title to the lake bed as grantees through mesne conveyances from Humboldt County, Iowa, claiming that the land in controversy is swamp land, and under the act of congress of September 8th, 1850 was granted to the state of Iowa, and passed to Humboldt County under an act of the state legislature granting swamp land to the counties in the state in which they were situated.

It was claimed by the plaintiffs in the state court that the defendants wrongfully entered upon the land as the property of the United States for the purpose of pre-empting the same.

The State of Iowa, plaintiff in error herein, intervened in each of the suits, claiming that the land in question is the property of the state, and does not belong to either the plaintiffs or the defendants.

Each suit involves a different tract of land, but all lie within the bed of what is known as Owl Lake. The description of the different tracts of land so claimed, appears in paragraph seven of the petitions of the plaintiffs in the state court, and are set out in full upon pages 2-15 and 16 of the transcript, and it is not deemed necessary to repeat the same. The evidence was taken in all the cases at the same time, and so far as practicable applies to each.

The supreme court of the state of Iowa decided adversely

to the claim of the state, and the opinion rendered herein appears upon pages 86-87-88-89-90 and 91 of the transcript of the record.

After this opinion was handed down by the state court, a petition for a re-hearing was filed by counsel for the state which was by the state court overruled; upon the overruling of this petition, a petition for a writ of error, writ citation and assignment of errors were filed in the office of the clerk of the supreme court, such petition being set forth on pages 91 and 92 of the transcript of the record.

A writ of error was issued by the supreme court of the United States to the state court, upon the petitions of the plaintiff in error, and the cause is now in this court for hearing, in pursuance of such writ.

A motion has been filed by defendants in error to dismiss the writ, upon the ground that no federal question is involved in the case, and that there has not been drawn into question the validity of any treaty or statute of, or authority excercised by or under the United States, the decision whereof has been against the validity of such federal questions treaty, statute or authority.

Before taking up the question as to whether such motion should be sustained, we will briefly state the facts which appear of record in the cases named.

Owl Lake is about two miles in length, and of an average width of about one mile. It lies in Township 92, Range27, west of the fifth principal meridian, and the lands bordering thereon were surveyed and platted by the general government in 1851.

The lake was meandered by the government survey, and the lands bordering thereon were divided into subdivisions, many of them were irregular lots, as shown by the plat,

which appears at page 61 of the transcript. Some of the lots so surveyed are indicated on the book of original entries as swamp lands, and all were sold during the years from 1855 to 1858.

On the south, east, north and part of the west, were well-defined shore lines and banks. On the northwest were low lands and sloughs, through which the water flowed into the lake; the same is true of the west end of the western arm of the lake. The water from six to ten sections of land drained into the lake. The outlet was on the east side, near the southeast corner.

Timber grew upon the banks of the lake at different places, and quite a body existed on the south side. There was an island in the lake upon which timber grew.

There is no testimony of any living witness, who had seen the lake after its survey prior to 1856. Mr. John Johnson saw it about the first of August, 1856; he went around the southeast corner, but did not examine it carefully. He saw clear water, but his general impression was that the lake had largely grown up with weeds and water lilies during that season which was dry. He saw water free from vegetable growth. He was again at the lake in 1875, and saw clear water. Several witnesses saw the lake in 1862 and 1863, and some afterward from 1867 to 1871. These witnesses describe the lake somewhat differently, according to the dryness or wetness of the season in which they saw it, some describing it as having a considerable portion of clear water, and others as a marsh grown up with lilies and bulrushes.

In 1884 a ditch was excavated for the purpose of draining the lake, and this ditch was enlarged and deepeded in 1894. In January, 1897, a contract was entered into between the board of supervisors of Humboldt County and the Fort

Dodge and Fort Ridgley Railroad Company, which provided for the granting of all the swamp lands belonging to Humboldt County to such railroad company, upon the conditions named in such contract.

This contract is set forth upon pages 4-5-6-7 and eight of the transcript.

In 1895, George R. Pearsons and others, having obtained a claim to the land embraced within the meander lines of Owl Lake from Humboldt County, and having drained the same, induced the governor of the state of Iowa to request the commissioner of the United States Land Office to issue a patent to the state for the land in controversy, describing it as the unsurveyed portions of Sections 21, 22, 27and 28, in Township 92, Range 27, west of the fifth principal meridian, under the swamp land act, and afterward a patent was issued.

Four propositions were relied upon by the plaintiff in error in the state courts, viz:

First. That the lake beds of all meandered lakes and streams in the state belong to the state of Iowa, in trust for the public, by virtue of its sovereignty, and this right does not depend on any act of congress or grant from the United States.

Second. That the survey of the public lands of the United States, the approval of such survey by the land commissioner of the United States or the secretary of the interior, and the sale of lands under such survey, fixes the status of the meandered lakes and streams—except in cases of palpable mistake or fraud, beyond recall by any subsequent act of the land department.

Third. That the land commissioner of the United States

government has no authority, by act of congress or under the constitution, to patent to the state of Iowa any lake beds which had been meandered and were already the property of the state.

Fourth. That the governor of the state of Iowa was unauthorized by any law, to request the land commissioner of the United States to issue a patent for the land in controversy.

Hence, the two patents, first from the United States to the state of Iowa, and from the state of Iowa to Humboldt County, are wholly void.

Each of these propositions was determined adversely to the plaintiff in error by the supreme court of Iowa, and eight errors are assigned and now presented to this court for its determination thereof. The assignment of errors appears upon pages 93 and 94 of the transcript of the record.

CHARLES W. MULLAN, Attorney General,
For Plaintiff in Error.

BRIEF AND ARGUMENT UPON MOTION TO DISMISS.

I.

It is contended by defendants in error:

First. That no federal question is involved in this case, and that there has not been drawn into question the validity of any treaty or statute of the United States, or of any authority exercised by it, the decision whereon has been against the validity of such treaty, statute or authority; nor has there been drawn into question in this cause the validity of any statute of, or authority exercised under any state, on the

ground that such statute or authority is repugnant to the constitution, treaties or laws of the United States the decision whereon has been in favor of the validity thereof; nor has any claim been made in this cause of or to any title, right, privilege or immunity under the constitution, or any treaty or statute of or commission held or authority exercised under the United States, the decision whereon was against the title, right, privilege or immunity so set up or claimed.

Second. If any federal question was involved in this cause when the same was pending in the supreme court of Iowa upon appeal, whatever the decision of that court thereof, if any may have been, another question, not federal, was also involved and decided adversely to the plaintiff in error, and the decision of this latter question is sufficient to sustain the judgment of that court, irrespective of what its decision, if any, may have been upon such federal question.

It is the contention of plaintiff in error:

First. That there is drawn in question in this cause a title and right claimed by the plaintiff in error, under the constitution of the United States, and under a treaty and statute thereof, and under authority held and excercised by the United States, the decision of the state court whereon is against the title and right specially set up and claimed by the plaintiff in error, under the constitution, statute and authority of the United States, and that the right of the plaintiff in error to have such question re-examined, and the decision of the state court reversed or affirmed thereon by this court upon the writ of error, is authorized by Section 709 of the Revised Statutes of the United States.

Second. That no other question was involved in the cause decided adversely to the plaintiff in error by the state court

upon which the judgment of such court can be sustained irrespective of its decision upon the federal question involved in this cause.

These propositions will be considered in the order stated:

II.

IS THERE A FEDERAL QUESTION INVOLVED IN THIS CASE?

In paragraphs 1, 2, and 3 of the petition of intervention filed in the state court by the plaintiff in error, and upon which its claim to the land in question was tried, the claim is broadly made that the land in controversy was, and is, a part of the lake bed of the lake known as Owl Lake, lying wholly within the state of Iowa, and that the same did not constitute any part of the land which the United States government was authorized or empowered to sell.

That when the state was admitted into the Union, it became the owner of all lakes within its borders, under its sovereign right, subject to the right of the public to use the same, and that the title to the lake in question and the soil underneath the same at once became vested in the state, under the constitution and treaties of the United States.

That the United States government in surveying the public lands adjoining the lake in controversy, meandered the lands bordering thereon, and excluded the lake, and the soil underneath all the waters thereof from the government survey, under the authority of the statutes of the United States, and the rules and regulations of the department of the interior, as the property of the state of Iowa, in which the general government held no right or title.

Under the claim so made by the plaintiff in error, the question is directly presented to this court whether such claim constitutes any title or right under the constitution of the United States, or under any treaty or statute thereof, or under any authority held or exercised under the government of the United States.

If the claim of the defendant in error falls within the provisions of Section 709 of the judiciary act of the United States we are confronted with a second question which at once arises, viz: is the decision of the state court against the claim of title and right of the state to the land in question, such a decision against the title and right, privilege or immunity specially set up or claimed under the constitution, treaty, statute or authority of the United States as may be re-examined, reversed or affirmed by this court upon a writ of error?

It is now generally conceded that the territory out of which the state of Iowa was carved became a part of the territory of the United States under the treaty of 1803 between France and the United States, by which the territory of ~~Illinois~~ Louisiana was ceded to the United States. It is true that Virginia had, prior to that time claimed that its title to what was known as the northwest territory, included the territory which is now the state of Iowa, but such claim was never established by Virginia, or recognized, either by the United States or France prior to the treaty of 1803.

It is, however, immaterial to the solution of the questions involved in this case whether Virginia or France was the owner of such territory prior to its acquisition by the United States.

Under the act of the Virginia legislature of September 6th, 1780, by which the lands then claimed by that state northwest of the Ohio river were ceded to the United States, this condition was imposed upon the United States when it accepted that territory "subject to the terms and conditions contained in the before recited act of congress of the thirteenth day of September last. That is to say: Upon the condition that the territory so ceded shall be laid out and formed into states containing a suitable extent of territory, not less than one hundred nor more than one hundred and fifty miles square, but as near thereto as circumstances will permit; and that the states so formed shall be distinct republican states, and admitted members of the federal union, having the same rights of sovereignty, freedom and independence as the other states."

It is, of course, well known to this court, that at the time of the formation of our government, the United States neither owned nor held any lands under its right of sovereignty. All lands and all rights which it thereafter acquired in what has been generally known as the public domain came, through deeds of cession from the thirteen original states, and through treaties with other nations afterward negotiated by the general government.

Virginia was the first state to cede its unoccupied territory to the United States, and its deed of cession was used as a model by the other states in ceding the lands to which they claimed title.

Under the condition above quoted, every state erected out of the territory so ceded to the United States, when admitted into the Union, took and retained the same rights of sov-

ereignty freedom and independence as was previously held by each of the thirteen original states.

One of the rights of sovereignty so possessed by these states, was the title to all of the waters within the state and the soil underneath the same; so that whatever right the United States acquired in the territory of Iowa by the Virginia cession, the condition incorporated in such cession gave to Iowa, when it was admitted into the Union, every sovereign right theretofore possessed by the state of Virginia.

If the title to the territory now embraced within the boundaries of the state of Iowa came to the United States through the treaty with France negotiated on the thirtieth day of April, 1803, it is important that we turn to the provisions of that treaty for the purpose of determining upon what conditions the United States took such territory.

Article 3 of the treaty of cession with France provides:

"The inhabitants of the ceded territory shall be incorporated into the Union of the United States, and admitted as soon as possible, according to the principles of the federal constitution, to the enjoyment of all the rights, advantages and immunities of citizens of the United States."

By act of congress of December 28th, 1846, Iowa was admitted into the union, and her standing as a sovereign state was fixed by such act of congress in these words:

"That the state of Iowa shall be one, and is hereby declared to be one of the United States of America, and admited into the Union on an equal footing with the original states in all respects whatsoever."

It is therefore clear that under the deed of cession from Virginia, so far as Virginia had any claim to the territory now embraced within the boundaries of the state, and under

the treaty of 1803 between the United States and France, and under the act of congress 1846 admitting Iowa into the Union, that state when it became one of the states of the Union became possessed of every right, advantage and immunity which had theretofore been possesed by the original thirteen states.

This principle was determined by this court in Pollard's Lessee v. Hagen et al., 3 Howard, 212.

Mr. Justice McKinley, in delivering the opinion of the court, said:

"All that part of Alabama which lies between the thirty-first and thirty-fifth degree of north latitude, was ceded by the state of Georgia to the United States, by deed bearing date of the twenty-fourth day of April, 1802, which is substancially, in all of its principles and stipulations like the deed of cession executed by Virginia to the United States on the first day of March, 1784, by which she ceded to the United States the territory northwest of the river Ohio. Both of these deeds of cession stipulated that all the lands within the territory ceded, and not reserved or appropriated to other purposes, should be considered as a common fund for the use and benefit of the United States, to be faithfully and *bona fide* disposed of for that purpose, and for no other use or purpose whatever.

"And the deed of cession by Georgia it is expressly stipulated 'that the territory thus ceded shall form a state, and be admitted as such into the Union as soon as it shall contain sixty thousand free inhabitants, or at an earlier period if congress shall think it expedient, on the same conditions and restrictions, with the same privileges, and in the same manner as is provided in the ordinances of congress of the thir-

tenth day of July, 1787, for the government of the northwest territory of the United States, which ordinance shall, in all of its parts, extend to the territory contained in the present act of cession, that article only accepted which forbids slavery.'

"When Alabama was admitted into the Union on an equal footing with the original states she succeeded to all of the rights of sovereignty, jurisdiction and eminent domain which Georgia possessed at the date of the cession, except as so far as this right was diminished by the public lands remaining in the possession and under the control of the United States for the temporary purposes provided for in the deed of cession, and the legislative acts enacted with it.

"Nothing remained to the United States, according to the terms of the agreement, but the public lands; and, if an express stipulation had been inserted in the agreement granting the municipal right of sovereignty and eminent domain to the United States, such stipulation would have been void and inoperative, because the United States have no constitutional capacity to exercise municipal jurisdiction, sovereignty or eminent domain, within the limits of the state or else where, except in the cases in which it is expressly granted.

"Alabama is therefore entitled to the sovereignty and jurisdiction over all the territory within her limits, subject to the common law, to the same extent that Georgia possessed it before she ceded it to the United States. To maintain any other doctrine is to deny that Alabama has been admitted into the Union on equal footing with the original states, the constitution, laws and compact to the contrary notwithstanding.

"This right of eminent domain over the shores and the soils under the navigable waters, for all municipal purposes belongs exclusively to the states within their respective territorial jurisdictions, and they and they only have the constitutional power to exercise it."

In Martin v. Waddell, 16 Peter, 410, it is said:

"When the revolution took place, the people of each state became themselves sovereign, and in that character hold the absolute right to all their navigable waters, and the soils under them, for their own common use, subjet only to the rights since surrendered by the constitution to the general government."

The principle announced in this case has since been approved and followed by this court.

Withers v. Buckley, 20 Howard, 92.

McCready v. Virginia, 4 Otto, 394.

Bridge Company v. United States, 15 Otto, 491.

Pennsylvania v. Wheeling and Bridge Company. 13 Howard, 518.

Shively v. Bowlby, 152 U. S., 81.

Mann v. Land Company, 153 U. S., 273.

Mumford v. Wardwell, 6 Wallace, 436.

Knight v. U. S. Land Association, 142 U. S., 161-177.

In Illinois Central Railroad Company v. Illinois, Mr. Justice Field, in delivereing the opinion of the court, said:

"The state of Illinois was admitted into the Union in 1818, on an equal footing with the original states in all respects. Such was one of the conditions of the cession from Virginia of the territory northwest of the Ohio river, out of which the state was formed. But the equality prescribed

would have existed had it not been thus stipulated. There can be no distinction between the several states of the Union in the character of the jurisdiction, sovereignty and dominion which they may possess and exercise over persons and subjects within their respective limits.

"It is the settled law of this country that the ownership of, and dominion and sovereignty over lands covered by tide waters within the limits of the several states, belong to the respective states in which they are found, with the consequent right to use or dispose of any portion thereof when that can be done without substantial impairment of the interest of the public in the waters, and subject always to the paramount right of congress to control their navigation, so far as may be necessary for the regulation of commerce with foreign nations among the states."

The state of Iowa claimed the title to the land in question under the rights conferred upon it by the deed of cession to the United States, and by the treaty of 1803 between the United States and France, as guaranteed by the constitution and the laws of the United States to each of the several states composing the federal union, and the fact that the state court upheld the authority of the United States in issuing a patent to the state of Iowa to the land in question as swamp lands, under the act of congress of 1850, in no wise prevents the plaintiff in error from having its right and claim reviewed and determined by this court upon a writ of error, as such decision is adverse to the right claimed by the plaintiff in error, and falls within the provisions of Section 709.

In Banks v. The Mayor, 7 Wallace, 16, it was held that where an act of the state legislature authorized the issue of bonds, by way of refunding to banks such portions of a tax as had been assessed on federal securities made by the con-

stitution and statutes of the United States exempt from taxation, and the officers who were empowered to issue such bonds refused to sign them because, as they alleged, a portion of the securities for the tax on which the bank claimed re-imbursement was in law not exempt, and the highest court of the state sanctioned such refusal, that its decision was against a right, privilege or immunity claimed under the constitution or statute of the United States, and that this court had jurisdiction, under the judiciary act, to review, and affirm or reverse the decision of the state court upon a writ of error.

Mr. Chief Justice Chase, in delivering the opinion of the court, said:

"The first question to be considered is one of jurisdiction. It is insisted on behalf of the defendants in error that the judgment of the New York Court of Appeals is not subject to review in this court. * * * But it was objected, on the part of those officers, that the particular description of obligations of the tax on which the associations claimed re-imbursement, were not exempt from taxation.

"The associations on the other hand insisted that these obligations were exempt, under the constitution and laws of the United States. If they were so exempt, the associations were entitled to the relief which they sought.

"The judgment of the Court of Appeals denied the relief upon the ground that certificates of indebtedness were not entitled to exemption.

"Is it not clear that in the case before the state court a right, privilege or immunity was claimed under the constitution or under the statute of the United States, and that the decision was against the right, privilege or immunity claimed?

"And further, that the jurisdiction of this court to review that decision is within the express words of the mandatory act of February 5, 1867?

"There can be but one answer to this question. We find no ground for doubt on the point of jurisdiction."

Can it not be said with equal force as to the case at bar, that the state of Iowa claims title to the land in question under the constitution and statutes of the United States, and under the deed of cession and treaty referred to, and the the highest court in the state of Iowa has denied that the state has such right and title, and therefore this court has jurisdiction to review that decision, under the provisions of Section 709?

In Trebilcock v. Wilson, 12 Wallace, 687, it is held where a plaintiff in error set up in the court below that he was entitled to have a note held by him and made by the defendant in error paid in gold or silver coin, under the constitution, and the decision of the court below was against such right, this court has the right to review such decision upon a writ of error.

Mr. Justice Field, in delivering the opinion of the court, said:

"There is, however, a preliminary question of jurisdiction raised, which must be first disposed of. The state court, in holding the tender legal and sufficient, sustained the validity and constitutionality of the act of congress declaring the notes a legal tender. Its decision was, therefore, in favor of, and not against, the right claimed by the plaintiffs under the act of congress, and hence it is contended that the appellate jurisdiction of this court does not arise under the 25th section of the Judiciary Act of 1789. Some support is given

to this view by the decision of this court in Roosevelt v. Meyer, 1 Wallace, 512 where it was held that, as the validity of the legal tender act was drawn in question in that case, and the decision of the state court was in favor of it, and of the right set up by the defendant, this court had no jurisdiction to review the judgment, and a dismissal of the case was accordingly ordered. The court in that case confined its attention to the first clause of the 25th section of the Judiciary Act, and, in its decision, appears to have overlooked the third clause. That section provides for the review of the final judgments and decrees of the highest court of a state in which decisions could be had, in three classes of cases:

"First. Where is drawn in question the validity of a treaty or statute of, or an authority exercised under the United States, and the decision is against their validity.

"Second. Where is drawn in question the validity of a statute of, or an authority exercised under any state, on the ground of their being repugnant to the constitution, treaties or laws of the United States, and the decision is in favor of their validity.

"Third. Where is drawn in question the construction of any clause of the constitution, or of a treaty or statute of, or commission held under the United States, and the decision is against the title, right, privilege or exemption specially set up or claimed by either party under such clause of the constitution, treaty, statute or commission.

"Under the last cause the appellate jurisdiction of this court in the case of Roosevelt v. Meyer might have been sustained. The plaintiff in error in that case claimed the right to have the bond of the defendant paid in gold or silver coin under the constitution, upon a proper construction of

that clause which authorizes congress to coin money and regulate the value thereof and of foreign coin; and of those articles of the amendments which protect a person from deprivation of his propery without due process of law; and declare that the enumeration of certain rights in the constitution shall not be construed as a denial or disparagement of others retained by the people; and reserve to the states or the people the powers not delegated to the United States or prohibited to the states.

"The decision of the court below being against the right of the plaintiff in error claimed under the clauses of the constitution, the construction of which was thus drawn in question, he was entitled to have the decision brought before this court for re-examination.

"In the present case, as the defendant claimed a similar right upon a construction of the same and other clauses of the constitution, and a like adverse decision of the court below was made, he is equally entitled to ask for a re-examination of the decision.

"But the defendant also claimed a right to demand coin in payment of the note of the plaintiff by the acts of congress regulating the gold and silver coins of the United States, and making them a legal tender in payment of all sums according to their nominal or declared values, contending that the act of 1862 making notes of the United States a legal tender for debts, did not apply to the contract in suit. He thus claimed in fact, although he did not state his position in this form, that, upon a proper construction of the several acts together, he was entitled to payment in coin. This right having been denied by an adverse decision, he was clearly in a condition to invoke the appellate jurisdiction of this court for a review of the decision.

"Nor is the appellate jurisdiction of this court, in this case, affected by the change in the language of the third clause of the twenty-fifth section of the Judiciary Act of 1789, by the second section of the amendatory judiciary act of February 5th, 1867. By this clause in the latter act the judgment or decree of the highest court of a state can be reviewed, 'where any title, right privilege or immunity is claimed under the constitution, or any treaty, or statute of, or commission held, or authority exercised under the United States, and the decision is against the title, right, privilege or immunity specially set up or claimed by either party, under such constitution, treaty, statute, commission or authority.'

"The section came incidentally before the court at the last term, in Stewart v. Kahn, 11 Wallace, 502, but it was not deemed necessary to determine whether it has superceded the twenty-fifth section of the Judiciary Act of 1789. As there observed, it is to a great extent a transcript of that section; and several of the alterations of phraseology are not material. The principal addition is found in the second clause, and the principal omission is at the close of the section. But in this case, as in that, there is no occasion to express any opinion as to the effect of the new section upon the original. Under the new section, as under the old, if that be superseded, the plaintiff in error can seek a review of the decision made against the right claimed by him."

In the case of Magwir v. Tyler, et al., I Black, 195, the Secretary of the Interior, over-ruling the decision of the Surveyor General, held that the representatives of one Brazeau had no title to certain lands in the state of Missouri, which they claimed under the original Spanish grant, and

Spanish certificates which had been made when the territory comprising the state of Missouri was a part of the territory of Louisiana. The supreme court of Missouri affirmed the ruling of the Secretary of the Interior, and rendered a decision against Magwir, who claimed from Brazeau, holding that he had no title to the land in question. Magwir sued out a writ of error to the state court of Missouri, and the case was brought to this court for hearing upon such writ. A motion was made to dismiss the writ for want of jurisdiction, upon the ground that no question was involved which gave this court the right to re-examine and affirm or reverse the case.

In deciding this question, Mr. Justice Catron said:

"But Brown's certificate identified its locality and boundary, and fixed the title to the land subject to be sued for and recovery by the local laws of Missouri. And the bill was filed to assert this title, on the ground that the Secretary of the Interior Department had no authority to set aside the certificate, divest Brazeau's title, and locate the land elsewhere. The construction of the acts of congress conferring power on the secretary to do the acts complained of, were prominently drawn in question and the decision below rejected the title set up by maintaining the validity of the secretary's decision.

"The case falls within the principles declared in Lytle's case, 22 Howard, 202. The finding of the state court and the decree founded on that finding, show that the question necessary to give this court juridiction was raised and decided."

In Lytle's case, referred to, 22 Howard 193, it was held:

"Where the decision of a state court was against the valid-

ity of an entry of land which had been allowed by the proper officers of the United States, this court had jurisdiction under the judiciary act to hear the case upon writ of error, and revise the judgment of the court below."

In Dooley v. Smith, 13 Wallace, 604, Dooley being indebted to Smith in the sum of about ten thousand dollars, made a tender of greenbacks to Smith of the amount due upon his note; this tender was refused by Smith. Dooley brought the money into the state court, and filed a petition asking the cancellation of the note and the mortgage securing the same. To this petition, Smith filed a general demurrer, and also brought an independent action against Dooley to recover the amount due upon his note in which Dooley answered, setting up the tender, etc.

The two cases were consolidated, and the court found against Dooley and in favor of Smith, and rendered a judgment of foreclosure for the amount found to be due upon Dooley's note.

The supreme court of Kentucky affirmed this decision, and Dooley brought the case to this court upon a writ of error. This decision drew into question the validity of the legal tender act of the United States, and Mr. Justice Miller, speaking for the court, held that such fact gave this court jurisdiction.

In Pennywitt v. Eaton, 15 Wallace, 380, Eaton sued Pennywitt in the Pulaski county court of Arkansas upon the record of a judgment rendered by the Fourth District court of New Orleans, that court, when the judgment was rendered, having been held by a judge appointed by the military governor of Louisiana.

On the trial, the court was requested by the defendant to hold that if it appeared from the evidence that the judge

who presided at the New Orleans court and rendered the judgment therein held his office by appointment of a military governor of the state of Louisiana, and under no other authority, the judgment rendered by said court was void.

The Pulaski court refused to so hold, and held the judgment of the New Orleans court valid. This holding was affirmed by the supreme court of Arkansas. The cause was brought to this court upon a writ of error sued out by Pennywitt. Chief Justice Chase, in rendering the opinion of the court, said:

"The Pulaski county court was requested to hold, that if it appeared from the evidence that the judge who presided in the court at New Orleans and rendered the judgment there, held his office by appointment from a military governor of the state of Louisiana, and under no other authority, the judgment was void. This raised, though somewhat obscurely, the question whether the court so held had any jurisdiction under the constitution of the United States, and the question was decided against the privilege claimed under the constitution by the defendants.

"We cannot, therefore, dismiss the case for want of jurisdiction, although we may have a very clear conviction that the decision of the state court was correct."

In Murdock v. City of Memphis, 20 Wallace, 590, the ancestor of Murdock conveyed to the city and one Wheatley, a certain tract of land, to be thereafter conveyed to the United States, for the purpose of a navy yard. After the government had taken such conveyance, it was decided not to use the land for a navy yard, and a re-conveyance thereof was made by the United States to the city of Memphis. Murdock then brought suit against the city of Memphis to recover the title to the land, alleging that it was conveyed by his ancestor

to the city, in trust, and for the purpose of being used for a government navy yard, and as the government had declined to use it for that purpose, and re-conveyed it to the city, the title thereof reverted to the original owner, and Murdock as his legal heir was entitled to recover the same.

The state court found against Murdock, and dismissed his bill. The supreme court of Tennessee affirmed this decree. Murdock brought the cause to this court upon a writ of error, and the question of jurisdiction was squarely raised in the case.

The opionion, which is by Mr. Justice Miller, is a very able and exhaustive one, in which the judiciary acts of 1779 and 1867 are carefully compared and distinguished, the holding of the court being that in as much as Murdock, the plaintiff in error, claimed his title to the land in question under an act of the United States government, viz:—the abandonment of its use for a navy yard and the conveyance thereof to the city of Memphis, such claim was a right claimed by him under an act and authority of the United States, and the state court having denied such right, this court had jurisdiction under section 709 of the Judiciary Act of 1867 to hear the case upon a writ of error, and to affirm or reverse the judgment of the state court.

Under the principle laid down in these cases, it seems clear that this court must hold that it has jurisdiction of this case, for the reasons,—

First. That the state claims the title to the land in question through the deeds of cession, treaties and acts of congress referred to, and that the decision of the state court was against such right thereunder claimed by the plaintiff in error.

Second. That the government survey of the public domain of Iowa by which the lake and lake bed in question were segregated and set apart by meander lines, from the lands which the government held in trust for the people of the United States, and the approval of such survey and segregation by the surveyor general and the commissioner of the general land office, was an adjudication by the government of the United States, by its duly authorized officers and agents that the lake and lake bed so segregated and set apart by such survey were the property of the state of Iowa, and not a part of the public domain which the general government held in trust for the people of the United States.

And as the state now claims title thereto under such adjudicatory act of the government, and the state court having denied such title, this court has jurisdiction to hear the case upon a writ of error, and to affirm or reverse the judgment of the court below.

Under the authority of these cases, we submit that this court must hold that there has been drawn into question in this cause a claim to a right and title under the constitution and statute of the United States, and under the authority exercised by the United States, the decision whereof by the state court is against the right and title claimed by the state of Iowa.

III.

Is there another question, not a federal question, also involved in this cause, which has been decided adversely to the plaintiff in error, the decision of which is sufficietn to sutain the judgment of the state court irrespective of what its decision may have been upon the federal question involved?

It appears to have been the thought of counsel in framing his motion to dismiss, that the holding of the state court that the governor was authorized to request a patent of the land in question from the general government, and to issue a patent to Humboldt county under the Swamp Land Act, and that the county took title to the lands thereunder which was afterward by conveyances transferred to the defendant in error, is sufficient to uphold the judgment rendered in the cause without drawing into it the federal question involved.

The contention of counsel upon this proposition appears to us to be erroneous, as every question determined by the state court relating to the issuance of a patent from the general government to the state of Iowa, and from the state to the county, necessarily rests upon the determination of the vital question which lies beneath every proposition in this case, that is: Did the state acquire title to the land in question by virtue of its sovereignty, and not through any grant from the general government?

If the state of Iowa acquired title to the land by right of sovereignty, no grant from the general government can add to that title. If it was not in fact a part of the swamp land of Iowa, as designated by the act of congress of September 28, 1850, the patent issued by the governor to Humboldt county was absolutely void, as no power or authority was lodged in him to convey any lands belonging to the state, except those included within the swamp land grant.

In holding the patent from the general government to the state and from the state to the county valid, the state court necessarily held that the state acquired no title to the land under its rights of sovereignty, and its decision rests entirely upon the determination of that question.

If the question as to whether the state took title to this land by virtue of its sovereignty had been determined by the state court in favor of the state, that court could never have found that the patent issued by the general government to the state, and by the governor to Humboldt county, had any force or validity in law. By holding adversely to the claim of the state as to its title in the land, the state court was able to say that these patents were valid and conveyed a valid title.

In Doolan v. Carr, 125 U. S. 618, is is said:

"There is no quesion as to the principle that when the officers of the government have issued a patent in due form of law, which on its face is sufficient to convey the title to the land described in it, such patent is to be treated as valid in actions at law as distinguished from suits in equity, subject, however, at all times to the inquiry whether such officers had the lawful authority to make a conveyance of the title. But if those officers acted without authority, if the land which they purported to convey had never been within their control, or had been withdrawn from that control at the time they undertook to exercise such authority, then their act was void for want of power in them to act on the subject matter of the patent, and not merely voidable."

The entire case, of the plaintiff in error, rests upon the proposition that it is the owner by right of its sovereignty of the land in question, and that no act of the general government, and no act of its own officers, can alienate its title thereto. All other questions involved in the case are collateral, and their determination by the state court, either in favor of or against the plaintiff in error, depends wholly upon the determination of the one question upon which the state's case rests.

We therefore submit that the decision of the state court does not rest upon the determination of any other question than the federal question drawn into the case; and that the cause falls within the provisions of section 709 of the Judiciary Act.

It is true that defendant in error contends that the state is estopped by the action of the governor in requesting a patent of the land from the United States government, and by having executed and delivered in the name of the state a patent therefor to Humboldt county. But this contention, as every other one involved in the case rests upon the soundness or the unsoundness of the contention of the plaintiff in error, that it holds title to the land in question by its right of sovereignty as a state.

The only theory upon which it can be claimed that the patent from the government to the state, and from the state to Humboldt county, was valid and effective, is that the land in question was a part of the swamp lands of the government within the boundaries of the state, and passed to the state under the act of congress of 1850. If it was not a part of the swamp land as designated by the United States government, and did not in fact pass to the state under the swamp land grant, and there was neither fraud nor mistake in the original survey thereof, the contention of defendant in error that the state is now estopped from claiming title to the land because of the act of its agent in requesting a patent from the general government, and in executing one to Humboldt county, cannot be maintained.

It is conceded that the land in question was the bed of a meandered lake and was excluded from the original government survey, and was not surveyed or designated upon the government plat as swamp land.

The rules adopted by the general land office for the survey and platting of government lands have the force and effect of law. They prescribe the means for ascertaining and defining the lands which are to be disposed of by the government for the benefit of all the states, and of excluding from such survey any portion of the territory to which the general government did not take title under deed of cession or treaty, through which it acquired title to the public domain. These rules and instructions also require the location and description of public waters left to the control of the sovereign state.

One of the instructions which has been approved by congress and the courts is as follows:

"You are also to meander in manner aforesaid all lakes and deep ponds of the area of twenty-five acres and upwards; also all navigable bayous. Shallow ponds readily drained or likely to dry up are not to be meandered."

In construing the act of September 28, 1850, John Wilson, commissioner of the general land office, in giving directions to the surveyor general of Arkansas relative to the selection of swamp lands, said:

"It is required by the act 'that in making out a list and plats of the land aforesaid, all local subdivisions, the greater part of which is wet and unfit for cultivation,' shall be included in said list and plats, but when the greater part of a subdivision is not of that character, the whole of it shall be excluded there from. * * * * * Satisfactory proof should be presented to you that the greater part of each forty acre lot claimed by the state is wet and unfit for cultivation, before certifying it as such under the law. When this fact is shown by the plats and field notes, it will be regarded as

conclusive that the land is of the character enuring to the state under the law."

In reply to the recommendation that a former approval of certain swamp lands in the state of Missouri be revoked and striken from the lists, J. Thompson, secretary of the interior made the following ruling:

"Department of Interior, Dec. 29, 1857.

In my opinion the approval and certificate of my predecessor are the completion of a duty in regard to swamp and overflowed lands imposed on the Secretary of the Interior by said act of September 28, 1850, and his act cannot now properly be reviewed or recalled. The state authorities have a right to call for a patent or patents pursuant to certified lists, unless fraud or mistake has been discovered. * * * * * *"

Under these rules, regulations and decisions of the Department of the Interior, the survey and platting of lands by that department, and the approval of such plat by the agents of the government, in the absence of fraud or mistake, is a complete adjudication as to what land the government claims under deed of cession or under treaties by which it receives title, what lands are swamp or overflowed lands, and what lands and waters it excludes from its survey as belonging to the state by right of sovereignty.

In Heath v. Wallaces, 138 U. S., 573, it is said:

"It is settled by an unbroken line of decisions of this court in land jurisprudence, that the decisions of that department upon matters of fact within its jurisdiction are, in the absence of fraud or imposition, conclusive and binding upon the courts of the country."

The land in question was not surveyed or platted, or

marked upon the plat of the lands of the township in which it is located, as swamp land. It was excluded from the government survey as land owned and held by the state under its right of sovereignty. Such survey and plat were approved by the department of the interior. That approval, in the absence of fraud or mistake, was a final adjudication that the land was not in fact swamp land, and that the state held the title to the lake thus meandered and excluded from the government survey, by right of sovereignty.

It therefore follows that the patent afterward made by the Secretary of the Interior to the state of Iowa, was without force or validity, and that the state acquired no title to such land thereunder, for the reason that it was not swamp land and was not included in the grant of 1850. It not being swamp land, the governor of the state had no power or authority to issue a patent thereof to Humboldt county, and that county took title or right under the void patent issued to it by the agent of the state.

The claim that the state is estopped by the action of its governor in thus attempting to convey to Humboldt county the title to the land in question, must fail for the reason that the state did not in fact part with its title, and Humboldt county acquired no title or right under the patent. Such patent was absolutely void and no question of estoppel can arise thereon.

Fairtitle v. Gilbert, 2 T. R., 169;
Stokes v. Jones, 18 Ala., 734;
Gordon v. San Diego, 101 Calif., 522;
Caffrey v. Dugeon, 38 Ind., 512;
Marion v. Boston, etc., R. C., 107 Mass., 241;
Reinhard v. Virginia Lead Mining Co., 107 Mo., 627;

Collins v. Benbury, 3 Ired. L., 285 (38 Am. Dec., 722).

Nor can an estoppel arise from the unauthorized acts of the agent or officer of the state.

Salem Imp. Co. v. McCourt, 26 Ore., 103;
State v. Brewer, 64 Ala., 287;
Pulaski County v. State, 22 Ark., 118;
Atty Gen. v. Mar., 55 Mich., 445;
Day Land, etc., Co. v. State, 68 Tex., 526.

The decision of the state court therefore rests alone upon the theory that the state is not the owner of the land in question under its right of sovereignty, and no other question is drawn into the case which can support such decision.

IV.

BRIEF AN ARGUMENT UPON THE ASSIGNMENTS OF ERROR.

Seven errors are assigned, and the questions raised by such assignments of error will now be taken up and presented in their order, although it is not deemed necessary to discuss each assignment of error separately, as several are so intimately connected that they may be properly considered together.

FIRST ASSIGNMENT OF ERROR.

The court erred in not holding that the lake beds of all meandered lakes and streams in the state of Iowa belong to said state of trusts for the public by virtue of its sovereignty and that this right does not depend upon any act of congress or any grant from the United States.

It is said in the brief of the defendant in error that the state court did not hold adversely to the plaintiff in error upon the question involved in the assignment of error. While it is true that the state court has made use of an expression which would appear, without investigation as to the real question upon which the decision in fact rests, to support the contention of the defendant in error, a careful reading of the opinion of the state court will disclose that it held adversely to the plaintiff in error upon the question presented by the first assignment.

The judgment of the state court upon the question involved in this assignment is based upon two propositions:

First. That the original survey, when approved by the surveyor general and the department, was not an adjudication as to the character of the lake and lake bed in question, and that in the absence of fraud or palpable mistake, the general government has the right thereafter to again enter upon the land, resurvey the same, and declare its character to be different from that shown by the original survey.

Second. That the state cannot complain if a resurvey of the land is thus made and its character changed from what was shown in the original survey.

Our contention is that the court erred upon both of these propositions. As to the first, it has been universally held by the department of the interior that where the survey of land is correct, it becomes final and effective when the plat is filed in the local office by that officer.

In Frazer v. O'Conner, 115 U. S., 102, it is said:

"There is nothing in the act of 1796 or any subsequent act which required the approval of the commissioner of the general land office before the survey became final and the plats authoritative."

In Tubbs v. Wilhoit, 138 U. S., 134, this court held that the plat made by the surveyors and used in the sale of land was to be considered as an approved plat by the fact that it was used as such, citing Wright v. Roseberry, 121 U. S., 516, and reaffirming the doctrine therein stated.

In Heath v. Wallace, 138 U. S., 573, it is said:

"It is settled by an unbroken line of decisions of this court in land jurisprudence, that the decisions of that department upon matters of fact within its jurisdiction are, in the absence of fraud or imposition, conclusive and binding upon the courts of the country."

And in French v. Fyan, 93 U. S., 169, it is held that if lands are not in fact swamp lands, that fact cannot be shown to take the same out of the list made by the Secretary of the Interior as ascertained from the plat and field notes of the original survey.

The duty of surveying the public domain and determining what lands belong to the general government under its deed of cession or treaty, what are arable lands and what are swamp lands, and what lands and waters the state holds title to under its right of sovereignty, is committed to the department of the interior for its determination; and any decisions made by such department within the scope of its powers and jurisdiction comes under the rule stated in Heath v. Wallace, supra.

There was no fraud or mistake in the original survey which meandered Owl Lake and set it apart as land and water belonging to the state. There has never been any resurvey of such lake, and the original survey has never been by the department of the government held incorrect or erroneous by reason of fraud or mistakes.

Under the holding of this court in the cases cited in a former division of this brief, when the survey of the lake in question was approved by the surveyor general and the department of the interior, or acted upon by the general government in making a sale of the adjoining lands, the lake and lake bed became the property of the state of Iowa under its right of sovereignty, and there is manifest error in the holding of the state court against this contention of the plaintiff in error.

As to the second question involved in this assignment of error, the state court say:

"No doubt this is a general rule, but who may complain of this survey? Surely not the state; for if the general government has power to order a survey because of a mistake, it also has power to determine whether there has been a mistake."

This holding of the state court appears to us to be manifestly erroneous. If it is true that the state holds the title to the lakes and lake beds of the state of Iowa, which have been meandered by the government survey and excluded therefrom, under its right of sovereignty it holds such title in trust for all the people of the state. The benefit of such title is not confined to abutting property owners, but enures to all the citizens of the state.

Whenever the title of the state to the land is questioned, or its right of possession interfered with, not only has the state the right, but it is its duty as trustee holding the title thereof for the benefit of the citizen of the state to at once intervene in whatever form of action or proceeding the question arises, and protect its right and title in and to the land, and thereby

preserve the same for the benefit of the people of the state for whom it holds such title in trust.

If we are correct upon the main contention presented to this court, namely: that the state holds the title to the land in question by right of sovereignty, no argument is required and no citation of authorities is necessary to establish the principle that the state has the right to intervene at all times to protect its title and possession of the property so held by it.

In Railway Co. v. Butler, 159 U. S., 87, a second survey made twenty years after the first and sales of land thereunder, were disregarded. The court, applying the language of Mr. Justice Bradley in Mitchell v. Smale, 140 U. S., 406, said:

"We think it a hardship, and one not to be endured, for the government officers to make new surveys and grants of the beds of such lakes after selling and granting the land bordering thereon or represented so to be. It is nothing more nor less than taking from the first grantee a most valuable, and often the most valuable, part of his grant. Plenty of speculaors will always be found, as such property increases in value, to enter it and deprive the proper owner of its enjoyment."

Continuing Mr. Justice Bradley further said:

"We do not mean to say that in running a pretended meandered line the surveyor may not make a plain and obvious mistake, or be guilty of a palpable fraud, in which case the government would have a right to recall the survey and have it corrected by the courts, or in some other way."

In the case at bar there is no claim that a mistake was made or a fraud perpetrated in the survey of Owl Lake. It

was segregated and excluded from the original survey by the proper officers of the government. All of the land bordering upon the lake was sold under the original government survey. The lake was named on the plat and no part of it was included within the government survey. That survey was not recalled by the interior or other department of the government. More than forty years after a patent is issued by the general government to the state, describing the lake as the unsurveyed portions of sections 21, 22, 27 and 28 in Township 92, Range 27, west of the fifth principal meridian and the defendants in error claim title under the patent issued by the governor of Iowa containing a like description.

The question at issue then is not one where there has been a palpable mistake or fraud in the survey, but where the original survey was correct and as to which no dispute has ever arisen. Under such circumstances can the title to the bed of a meandered lake be conveyed by the general government either to a state or to any person desiring to purchase the same or occupy it for homestead purpose under the laws of the United States?

The case in our opinion falls within the decision of French v. Fyan, supra, that a patent issued by the government either to the state or to an individual for the bed of a meandered lake, which was excluded from the original government survey and was not noted upon the plat, as required by the regulations of the land department, as swamp land, would be absolutely void, and that the state or the individual would take no right or title thereunder.

Recurring to the second question involved in the assignment of error under discussion, the state court certainly erred in holding that the state could not complain of being

deprived of the title and right of possession of the bed of a meanered lake to which it took title under its right of sovereignty.

It is said by defendant in error, "that the state court was not bound to hold that the beds of non-navigable meandered lakes belong to the state of Iowa in trust for the public by virtue of its sovereignty; it might have held, as courts in many of the states have held, that the beds of such lakes belong to the riparian owners and not to the state."

This position is somewhat remarkable, as it assumes that the supreme court of a state has the power to dispose of the property of the state as it sees fit, without regard to the law governing the right of the state to such property. In other words, although the title to the lake bed in question is in the state, and the state holds such title by virtue of its right of sovereignty, the supreme court, without warrant of law, might divest the state of such title and transfer it to an individual.

It has long been the established principle in the state of Iowa that the lands of riparian owners are bounded by highwater mark, and that their title does not extend beyond.

McManis v. Carmichael, 3 Iowa, 1;
Haight v. Keokuk, 4 Iowa, 199;
Tomlin v. Dubuque, etc., R. R., 32 Iowa, 106;
Barney v. Keokuk, 74 U. S., 250;
Noyes v. Collins, 92 Iowa, 566.

And it is said in Shively v. Bowlby, 152 U. S., 44, that the Iowa rule is the correct one, and in accord with the common law doctrine.

Under this rule that the lands of riparian owners upon the lake in question are bounded by highwater mark, and that the state of Iowa holds the title to the bed of the lake under

its right of sovereignty, how can it be said that the supreme court of the state by a decision which it may render, can divest the state of such title and transfer it to an individual? Several cases are cited as holding the doctrine that the ownership of the beds of non-navigable meandered lakes is a question for the determination of the states wherein such lakes are situated.

Without assenting to or dissenting from such proposition, it is a sufficient answer to say that if such contention is true, the disposition of the title to such lakes and lake beds must be by the legislature of the state, and not by its courts; and that in the absence of legislation, whereby the title is divested from the state and vested elsewhere, a decision of a state court that the state is not the owner of the lake and lake bed, segregated from the government domain by meander lines, is an erroneous decision and against the claim of the state to the title of such lake and lake bed under the laws and treaties of the government.

In Shively v. Bowlby, 152 U. S., 49, it is said:

"The congress of the United States in disposing of the public lands has constantly acted upon the theory that those lands, whether in the interior or on the coast, above high-water mark, may be taken up by actual occupants in order to encourage the settlement of the country; but that the navigable waters and the soil under them, whether within or above the ebb and flow of the tide, shall be and remain public highways; and being chiefly valuable for the public purposes of commerce, navigation and fishery, and for the improvements necessary to secure and promote these purposes, shall not be granted away during the period of territorial government; but unless in case of some international duty or public exigency, shall be held by the United States in trust

for the future states, and shall vest in the several states when organized and admitted into the Union with all the powers and prerogatives pertaining to the older states in regard to such waters and soils within their respective jurisdictions; in short, shall not be disposed of piece-meal to individuals as private property, but shall be held as a whole for the purpose of being ultimately distributed and dealt with for the public benefit of the state after it shall have become a completely organized community."

Applying this broad principle of the law to the case at bar, when by the government survey Owl Lake was segregated and set apart from the government survey by meander lines, it was defined and designated as a body of land and water belonging to the state, and in which the government had no title or interest. The state thereupon took and held the title in trust for the public, and nothing short of an act of the legislature of the state can divest such title. It cannot be disposed of piece-meal or to individuals as private property, but is to be held as a whole for the purpose of being ultimately distributed and dealt with for the public benefit. And the supreme court of the state manifestly erred in holding a doctrine contrary to the principles expressed in the quotation above given.

V.

SECOND ASSIGNMENT OF ERROR.

The court erred in holding that the survey of the public lands of the United States, the approval of such survey by the land commissioner of the United States and the Secretary of the Interior, and the sale of the land under such survey,

did not fix the status of the meandered lakes and streams, except in cases of palpable mistake or fraud beyond recall by any subsequent act of the land department.

It is sought to avoid the force of this assignment of error by the claim that the decision of the state court is not against the power of the government to set aside an original survey and order a re-survey, and for that reason a federal question is not drawn into the case upon which an error can be predicted. This appears to us to be a superficial view of the questions involved.

The effect of the decision of the state court is, that the title to the land in question can be taken from the state, after it was vested therein by the approval of the original survey, although there was no fraud or mistake in such survey, and the same had never in fact been set aside by the land department of the government.

This holding involves a federal question which has been decided adversely to the claim of the state under the treaty with France and under the laws of congress.

The determination of what is a lake is vested by law in the surveyor general. He is the tribunal which must determine that fact, and his decision, when approved by the commissioner of the general land office, is final, and when the government has sold the land according to a survey which fixes and determines the boundaries of a meandered lake upon the plat, it has no further interest in such land or lake.

> Grand Rapids & Ind. Ry. v. Butler, 159 U. S., 87;
> Mitchell v. Smale, 140 U. S., 406.

Nor can a survey made by the proper officers be challenged by a collatral attack.

> Russell v. Maxwell Land Grant Co., 158 U. S., 253;
> Kirwan v. Murphy, 83 Fed. Rep., 275.

In Cragin v. Powell, 128 U. S., 691, it is said:

"The power to make and correct surveys of the public lands belongs to the political department of the government, and that, whilst the lands are subject to the supervision of the general land office, the decisions of that bureau in all such cases, like that of other special tribunals upon matters within their exclusive jurisdiction, are unassailable by the courts, except by a direct proceeding; and that the latter have no concurrent or original power to make similar corrections, if not an elementary principle of our land law, is settled by such a mass of decisions of this court that its mere statement is sufficient."

In Moore v. Robbins, 96 U. S., 530, Mr. Justice Miller said:

"With the title passes away all authority or control of the executive department over the land and over the title which it has conveyed. It would be as reasonable to hold that any private owner of land who has conveyed it to another can, of his own volition, recall, cancel, or annul the instrument which he has made and delivered. If fraud, mistake, error, or wrong has been done, the courts of justice present the only remedy. These courts are as open to the United States to use for cancellation of the deed of reconveyance of the lands as to individuals, and, if the government is the party injured, this is the proper course."

Again in the same case, referring to the power of the secretary of the interior, it is said:

"He is absolutely without authority. If this were not so, the title derived from the United States, instead of being the safe and assured evidences of ownership which they are generally supposed to be, would be always subject to the fluctuating, and, in many cases, unreliable, action of the land office."

In the case at bar no patent was required from the government to vest the title of the lake bed in the state. That title was absolutely vested when the original government survey was approved by the proper officers, or when it was put in use by the government, which was in effect an approval. After such lake had been segregated and set apart from the public domain, and the title thereof had absolutely vested in the state under what principle of law or equity can it be claimed that the government, acting through the land department, can of its own volition recall, cancel or annul the act of the general government, which vested the title in the state, unless such act was tainted with fraud or done through mistake?

In Russell v. Maxwell Land Grant Co., 158 U. S., 256, Mr. Justice Brewer in delivering the opinion of the court, said:

"A survey made by proper officers of the United States and confirmed by the land department, is not open to challenge by any collateral attack in the courts."

And it has been so frequently held by this court that the land department has no further supervision over or interest in the lands after they have been sold according to the plat made and approved, that we almost feel like offering an apology for citing the authorities upon that proposition:

Moore v. Robbins, 96 U. S., 530;
Railway v. Butler, 159 U. S., 87;
Hardin v. Jordan, 140 U. S., 371.

Where no patent is required to convey the title from the government, whatever act is done by the government to indicate a decision and acceptance of the plat and survey, is a final adjudication to the same effect as though there had been a formal approval of the plat by the surveyor general and the commissioner of the general land office under the present statute.

Frasher v. O'Connor, 115 U. S., 102.

In Rogers Loco. Works v. Emigrant Co., 164 U. S., 559, it was held that the acceptance of a list of selected lands was sufficient.

The principle deducible from all of these authorities is, where the department of the government has once acted, either by issuing a patent or designating certain lands within a certain grant, or by meandering, segregating and setting apart as land belonging to the state, lakes and the lands under the waters thereof, and where such survey has not been set aside by the department for fraud or palpable mistake, then the jurisdiction of the land department is at an end and the survey and act of the agents of the government must be held conclusive in the premises. Any other rule would place the property and the rights of the state in its land and waters at the mercy of the land department of the general government.

Under these authorities it appears clear that the state court erred in holding that the survey of the public lands of the United States, the approval of such survey by the land commissioner and the secretary of the interior, and the sale of the land under such survey, did not fix the status of the meandered lakes in the state of Iowa, beyond recall, except for palpable mistake or fraud.

VI.

THIRD ASSIGNMENT OF ERROR.

The court erred in not holding that the land commissioner of the United States had no authority by act of congress or under the constitution, to patent to the state of Iowa any lake beds which had been meandered and were already the property of the state.

This and the fourth assignment of error, which is as follows:

FOURTH ASSIGNMENT OF ERROR.

The court erred in holding that the land commissioner of the United States had authority to take jurisdiction of the lake beds, and to re-investigate the question after the lapse of forty-four years, and to issue a patent therefor notwithstanding the alleged request of the governor so to do.

Are so nearly indentical that they may be properly considered together.

What has been said with regard to the second, applies with equal force to the third and fourth assignments of error.

The power of the government to issue a patent to land which has been segregated and set aside to the state by a survey which has never been set aside, and to take jurisdiction of lake beds and reinvestigate the question as to whether they should have originally been meandered and set apart to the state, is fairly stated by Mr. Chief Justice Fuller in Railway Co. v. Butler, 159 U. S., 87, who adapted the language of Mr. Justice Bradley in Mitchell v. Smale, 140 U. S., 406, where it is said:

"We do not mean to say that in running a pretended meander line the surveyor may not make a plain and obvious mistake, or be guilty of a palpable fraud, in which case the government would have the right to recall the survey and have it corrected by the courts, or in some other way. Cases have happened in which by mistake the meander line described by a surveyor in the field notes of his survey, did not approach the water line intended to be portrayed. Such mistakes of course do not bind the government. Nor do we mean to say that in granting lands bordering on a non-navigable lake or stream, the authorities might not formally, by express words, have limited the granted premises to the water edge, and reserved the right to survey and grant out the lake or river bottom to other parties. But since the grant to the respective states of all swamp and overflowed lands therein, this cannot be done. In the present case it cannot be seriously contended that any palpable mistake was made, or that any fraud was committed by the surveyor who made the survey in 1834-35."

In the case at bar the lake was surveyed and segregated by meander lines from the public domain, more than forty years ago. The government sold all of the land in the township bordering on the lake according to the platted divisions. When this was done it cased to have jurisdiction to recall the survey. The original survey was in fact never recalled, canceled or set aside. The land under the lake was not platted or designated as swamp lands; it did not pass to the state under the swamp land grant of 1850; and the state took its title thereto by right of sovereignty.

Under these facts and the principles of law governing cases of this character, as laid down by the decisions of this

court, the United States government had no authority, either by act of congress or otherwise, to issue a patent to the bed of the lake to the state of Iowa, and had no authority to take jurisdiction of such lake bed, and to re-investigate the question as to whether a lake did in fact exist at the time the original survey was made.

In this connection we again desire to call the attention of the court to the case of Cragin v. Powell, 128 U.S., 692, wherein Mr. Justice Lamar, in delivering the opinion of the court, said:

"It is conceded that this power of supervision and correction by the commissioner of the general land office, is subject to necessary and decided limitations. Nor is it denied that, when the land department has once made and approved a governmental survey of public lands, (the plats, maps, field notes and certificates all having been filed in the proper office), and has sold or disposed of lands, the courts have power to protect the private rights of a party who has purchased in good faith from the government, against the interferences or appropriations of corrective resurveys made by the department subsequently to such disposition or sale. But there is nothing in the circumstances of this case which brings it within any such limitations."

In Brown v. Hitchcock, 173 U. S., 478, Mr. Justice Brewer, quoting the language used in Cornelius v. Kessel, 128 U. S., 456, said:

"The power of supervision and correction is not an unlimited or arbitrary power. It can be exerted only when the entry was made upon false testimony or without authority of law. It cannot be exercised so as to deprive any person of land lawfully entered and paid for. By such entry and pay-

ment the purchaser secures a vested interest in the property, and a right to a patent therefor, and can no more be deprived of it by order of the commissioner than he can be deprived by such order of any other lawfully acquired property. Any attempted deprivation in that way of such interest, will be corrected whenever the matter is presented so that the judiciary act upon it."

Under the original survey and the plat made in conformity therewith, the state acquired the title to the land in question as fully and completely as though the same had been patented to the state by the federal government.

Under the decisions of this court, the state could no more be deprived of its property by any subsquent act of the land department of the government, or by any patent issued upon any subsequent survey, than could a private individual be deprived of land which he had purchased, paid for and to which the government had issued him a patent.

The state court therefore clearly erred in holding that the land department of the United States had any authority in or jurisdiction of the lake and lake bed in question, and such holding involves a federal question, for the reason that it divests the state of its title to such land, which it claims under the treaty of 1803, and the acts of congress pursuant thereto.

VII.

FIFTH ASSIGNMENT OF ERROR.

The court erred in holding that the patent issued for unsurveyed lake beds in the state of Iowa, could not be attacked or investigated by the courts, and that the issuance of said patent was a finality binding and conclusive upon the parties especially the state of Iowa.

It is undoubtedly true that the courts of the United States will adopt and follow the decisions of the highest court of a state, when the same have become rules of property within the state; and that the state courts have the power to determine the boundaries of riparian owners, and to fix the limits either at high or low water mark, or at the center of the stream. But the case at bar is far removed from any question of this character. The state is the plaintiff in error, and is prosecuting this case because the state court has sought to deprive it of the title to land which it took under it right of sovereignty by virtue of the treaties and laws of the United States.

The questions determined in Bondurant v. Watson, 193 U. S., 281, in Kaukauna Water Power Co. v. Green Bay & Miss. Canal Co., 142 U. S., 271, in Barnes v. Keokuk, 94 U. S., 324, and other cases cited in defendant's brief, are in no wise involved in the case at bar. The decision of the state court does not fix a rule of property within the state, nor does it define the boundaries of riparian owners. It goes far beyond either of these questions, and seeks to take away from the state itself, property to which it acquired title under its right of sovereignty as fixed by the treaties and laws of the United States.

In rendering its decision, the state court necessarily held that a patent issued by the land department of the government, without any authority of law and including land to which the government held not title whatever, and which was absolutely void at the time that it was issued, was a finality binding and conclusive upon the state.

It is said in Brown v. Hitchcock, 173 U. S., 478, that the power of supervision and correction of surveys and title con-

veyed by the government, can be exerted only when the entry was made upon false testimony or without authority of law.

If the patent was issued by the land department of the United States without authority of law, and to land to which the federal government had no title, it was absolutely void.

In Anderson v. Roberts, 18 Johnson, 527, 9 Am. Dec., 235, it is said:

"A thing is void which is done against law at the very time of doing it, and where no person is bound by the act."

This definition of a void instrument has been universally accepted by the courts of this country.

The patent issued by the government to the state was without authority of law, it was to land which the government did not own, it conveyed nothing to the state, and was of no more force or effect than would have been a patent wrongfully issued by the agents of the government to land which had been previously sold to an individual and to which the title was vested by a previous patent. The state therefore had the right, when such void instrument was sought to be used against it, to investigate its validity whenever and wherever the same was attempted to be used or enforced. By depriving the state of its right to question the validity of the patent, and by holding that the same was conclusive against the rights of the state, the court, in effect, held that no title to the land in question passed to the state under its right of sovereignty, when the same was segregated and set apart by the general government upon the approval of the survey of the public domain. And for that reason a federal question was and is involved in the holding of the state court.

VIII.

SIXTH ASSIGNMENT OF ERROR.

The court erred in holding that the constitution of the United States and the acts of congress prohibited the state of Iowa from questioning the legality of the acts of the land commissioner in taking cognizance of the lake in question, which had been segregated as a lake from the public lands of the United States in 1851, *and issuing a patent therefor under the stamp land act and that the state was bound by the act of the land commissioner in executing such patent.*

This assignment of error raises the same question as the fifth assignment of error, except as to the form in which it is presented. The fifth assignment goes to the validity of the patent itself, while the sixth assignment is as to the acts of the land commissioner on issuing such patent.

In Knight v. U. S. Land Ass'n, 142 U. S., 176, it is said:

"The case as presented by this record involves some very interesting questions. Ever since the decision in Polk's Lessee v. Wendall, 9 Cranch, 87, it has been the settled law of this court that a patent is void at law if the grantor state had no title to the premises embraced in it, or if the officer who issued the patent had no authority to do so, and that want of such title or authority can be shown in an action at law. Patterson v. Wynn, 11 Wheaton, 380; Stoddard v. Chambers, 2 How., 284; Easton v. Salisbury, 21 How., 426 Reichart v. Felps, 6 Wall., 160; Best v. Polk, 18 Wall., 112; Smelting Co. v. Kemp. 104 U. S., 636; Steel v. Smelting Co., 106 U. S., 447; Wright v. Rosebery, 121 U. S., 488; Doolan v. Carr, 125 U. S., 618, and authorities there cited."

The principle of law laid down in the quotation above

given is conclusive as to the question involved in the fifth and sixth assignments of error. It is certain that the United States government had no title to the premises embraced in the patent issued to the state, and it is equally certain that the land commissioner who issued the same did so without authority. These propositions established, it follows as a logical sequence, that the state had the right to meet such void instrument whenever and wherever the same was sought to be put in force against its title and to question the authority of the land department of the general government to issue the same. And the state court was clearly in error in holding the contrary rule. A federal question was involved in such decision, for the reason, as before stated, it took away from the state a right which it claimed under a treaty of the United States and under the laws of congress.

It is said in counsel's brief:

"Suppose this court should reverse the case and remand it, and that the supreme court of Iowa should say, 'We care not whether the secretary of the interior had or had not the power to issue a patent; we say, as we have already in substance said before, the state of Iowa under the circumstances of this case, is in no position to complain; only abutting property owners can do that.' Would not the ultimate decision of the case stand just the same as if no writ of error had been taken to this court?"

To this we answer emphatically, No. If this court reverses the case upon the writ of error, and holds that the state of Iowa is the absolute owner of the land in question under its right of sovereignty and by virtue of the laws and treaties of the United States, it must necessarily hold that it has the right to intervene and maintain its title to such land

whenever there is an attempt to deprive it of such title. And whatever decision is afterward rendered by the state court must be in conformity with such holding of this tribunal.

In Smelting Co. v. Kemp, 104 U. S., 636, it is said:

"When we speak of the conclusive presumptions attending a patent for land, we assume that it was issued in a case where the department had jurisdiction to act and execute it. That is to say, in a case where the lands belonged to the United States and provision had been made by law for their sale. If they never were public property, or had previously been disposed of, or if congress had made no provision for their sale, or had reserved them, the department would have no jurisdiction to transfer them, and its attempted conveyance of them would be inoperative and void, no matter with what seeming regularity the forms of law may have been observed. The action of the department would in that event be like that of any other special tribunal not having jurisdiction of a case which it had assumed to decide. Matters of this kind, disclosing a want of jurisdiction, may be considered by a court of law. In such cases the objection to the patent reaches beyond the action of the special tribunal and goes to the existence of a subject upon which it was competent to act."

IX.

The seventh assignment of error is substantially identical with the fifth, and the argument made as to the fifth assignment of error is applicable thereto. We will therefor submit such assignment without further argument.

X.

In conclusion we respectfully submit that a federal question is drawn into the decision of this case by the state court, which gives this tribunal jurisdiction to hear the cause upon its merits, and that the decision of the state court is manifestly erroneous upon the questions involved in the errors assigned in this court. That the cause should be reversed and remanded to the state court to be there tried in accordance with the rules of law, as determined by the decision of this tribunal.

CHAS. W. MULLAN,
Attorney-General of Iowa,
Counsel for Plaintiff in Error.

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No. 265.

Office Supreme Court U.S.
FILED
JAN 5 1901
JAMES H. MCKENNEY,
Clerk.

Br. of Wright for D. C. & co.

Filed Jan. 5, 1901.

MOTION TO DISMISS WRIT OF ERROR.

IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1900.

Term Number 265.

THE STATE OF IOWA, PLAINTIFF IN ERROR,

vs.

EDWIN O. ROOD, CHARLES W. ROOD, GEORGE A. WALLACE, EMILY J. WALLACE, GEORGE S. WALLACE, AND MRS. GEORGE S. WALLACE,
DEFENDANTS IN ERROR.

IN ERROR TO THE SUPREME COURT OF IOWA.

(17,738)

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DEFENDANTS IN ERROR.

IN ERROR TO THE SUPREME COURT OF IOWA.

NOTICE OF MOTION TO DISMISS WRIT OF ERROR

To MILTON REMLEY, ESQ., Attorney for the Plaintiff in Error, Iowa City, Iowa:

SIR: You will please take notice that the Defendants in Error, Edwin O. Rood, Charles W. Rood, and George R. Pearsons, will, upon Monday, the 28th day of January, 1901, at the opening of court on said day, or as soon thereafter as counsel can be heard, move the Supreme Court of the United States at the court room of said Supreme Court at the Capitol in the City of Washington, D. C., to dismiss the writ of error to the Supreme Court of Iowa heretofore, and on or about the 31st day of March, A. D. 1900, sued out of said Supreme Court of the United States by said plaintiff in error above named, and for such other and further order or relief as to the court may seem just.

Further take notice, that said motion will be based upon the ground that said Supreme Court of the United States has no jurisdiction of said cause above entitled, because:

1. This cause does not involve a federal question; that is to say, there has not been drawn into question in this cause the validity of any treaty or statute of, or any authority exercised under, the United States, the decision whereon has been against the validity thereof. Nor has there been drawn into question in this cause the validity of any statute of, or any authority exercised under, any State on the ground that such statute is repugnant to the Constitution, treaties or laws of the United States, the decision whereon has been in favor of the validity thereof. Nor has any claim been made in this cause of or to any title, right, privilege or immunity under the Constitution, or any treaty or statute of, or commission held, or authority exercised, under the United States, the decision whereon was against the title, right, privilege or immunity so set up or claimed.

2. If any federal question was involved in this cause when the same was pending in the Supreme Court of Iowa upon appeal, whatever the decision of that court thereon (if any) may have been, another question, not federal, was also involved and decided adversely to the plaintiff in error, and the decision of this latter question is sufficient to sustain the judgment of that court, irrespective of what its decision (if any) may have been upon such federal question.

Further take notice, that at the same time and place said defendants in error will move said Supreme Court of the United States for such other and further order or relief as to said Supreme Court of the United States may seem just.

Further take notice, that said motion will be made upon all the records, files and papers of said cause above entitled, on file in said Supreme Court of the United States, which will be referred to in support thereof.

R. M. WRIGHT,
Counsel for Defendants in Error.

Service of the foregoing notice and of the following motion

and brief acknowledged and accepted and a copy of each thereof received on this ....day of December, A. D. 1900.

....

Attorney for Plaintiff in Error.

The State of Iowa, Plaintiff in Error,
vs.
Edwin O. Rood, Charles W. Rood, George A. Wallace, Emily Wallace, George S. Wallace, and Mrs. George S. Wallace.

MOTION

Now come Edwin O. Rood, Charles W. Rood, and George R. Pearsons, through their undersigned counsel, and move the court to dismiss the writ of error to the Supreme Court of Iowa, heretofore, to-wit: on or about the 31st day of March, A. D. 1900, sued out in this cause, in said cause, and for such other and further order or relief as to the court may seem just.

SPECIFICATION OF GROUNDS FOR MOTION.

The motion to dismiss the writ of error made above is based upon the ground that this court has no jurisdiction to review the judgment of the Supreme Court of Iowa, heretofore entered in this cause, because:

1. This case does not involve a federal question; that is to say, there has not been drawn into question in this cause the validity of any treaty or statute of, or any authority exercised under, the United States, the decision whereon has been against the validity thereof. Nor has there been drawn into question in this cause the validity of any statute of, or any authority exercised under, any State on the ground that such statute or authority is repugnant to the Constitution, treaties or laws of the United States, the decision whereon has been in favor of the validity thereof. Nor has any claim been made in this cause of or to any title, right, privilege or immunity under the Constitution, or any treaty or statute of, or commission held, or authority exercised under the United States, the decision whereon was against the title, right, privilege or immunity so set up or claimed.

2. If any federal question was involved in this cause when the same was pending in the Supreme Court of Iowa upon appeal, whatever the decision of that court thereof (if any

may have been, another question, not federal, was also involved and decided adversely to the plaintiff in error, and the decision of this latter question is sufficient to sustain the judgment of that court irrespective of what its decision (if any) may have been upon such federal question.

STATEMENT OF THE CASE.

To enable this court to pass upon, determine and decide the foregoing motion, the case will be sufficiently stated by setting out from, the transcript, the pleadings, the decision of the District Court of Humboldt County, Iowa, the opinion of the Supreme Court of Iowa, and the assignments of error made in this court by plaintiff in error, all of which are as follows:

The following entitled causes were originally brought in the District Court of Humboldt county, Iowa:

EDWIN O. ROOD and CHAS. W. ROOD, Appellees,
vs.
GEORGE A. WALLACE, EMILY J. WALLACE, GEORGE S. WALLACE and MRS. GEORGE S. WALLACE, Appellees.
STATE OF IOWA, Intervenor, Appellant.

GEORGE R. PEARSONS, Appellee,
vs.
A. F. JOHNSON and MRS. A. F. JOHNSON, Appellees.
STATE OF IOWA, Intervenor, Appellant.

GEORGE R. PEARSONS, Appellee,
vs.
GEORGE A. WALLACE and EMILY J. WALLACE, Appellees.
STATE OF IOWA, Intervenor, Appellant.

EDWIN O. ROOD and CHAS. W. ROOD, Appellees,
vs.
B. D. BARRETT and MELINDA BARRETT, Appellees.
STATE OF IOWA, Intervenor, Appellant.

EDWIN O. ROOD and CHAS. W. ROOD, Appellees,
vs.
JAMES O'CONNELL and MRS. JAMES O'CONNELL, Appellees
STATE OF IOWA, Intervenor, Appellant.

Inasmuch as the pleadings in the above entitled cases are practically identical with the exception of the seventh paragraph of plaintiff's petition which contains a description of the land in

controversy in each case, it will be necessary to set out one set of pleadings only, and the seventh paragraph of the petition in the other cases.

In the case of Edwin O. Rood and Charles W. Rood vs. George A. Wallace et. al., on the 25th day of January, A. D. 1895, plaintiffs filed in the office of the clerk of Humboldt county the following petition in equity:

The plaintiff states:

Par. 1. That the land hereinafter described was conveyed to the State of Iowa by the United States of America under and by virtue of the Act of Congress of the United States approved on September 28th, 1850, and known as the Swamp Land Act.

Par. 2. That said land inured to the benefit of Humboldt county, Iowa, under the act of the Legislature of the State of Iowa, approved January 13, 1853, which took effect February 2, 1853, and is known as Chapter 13 of the Laws of the Fourth General Assembly of Iowa, and an act of the Legislature of the State of Iowa approved January 25, 1855, and which took effect February 21, 1855, and is known as Chapter 110 of the Laws of the Fifth General Assembly of Iowa.

Par. 3. That said land, with other land, on the 8th day of January, 1879, was, by contract in writing, between said county of Humboldt and the Fort Dodge & Fort Ridgely Railroad Company, a corporation duly organized and doing business under the laws of the State of Iowa, sold and disposed of to said Fort Dodge & Fort Ridgely Railroad Company by said county, a copy of which contract is hereto attached, marked Exhibit "A," and made a part of this petition.

Par. 4. That thereafter and in pursuance of said contract and on the 1st day of September, A. D. 1884, the said Humboldt county transferred to said railroad company all its right, title and interest in said land, a copy of which deed is hereto attached marked Exhibit "B" and made a part hereof.

Par. 5. That on the 15th day of December, A. D. 1884, the said railroad company conveyed by deed in writing to one A. McBane, all its right, title and interest in the said land, a copy of which deed is hereto attached marked Exhibit "D" and made a part of this petition.

Par. 6. That thereafter and on the 19th day of December, A. D. 1884, the said A. McBane conveyed by deed in writing to one George R. Pearsons, the said land, a copy of which deed is hereto attached marked Exhibit "C" and made a part hereof.

Par. 7. That thereafter and on the day of , 1892, the said George R. Pearsons by deed in writing conveyed the said land to the plaintiffs in this suit, which said land was conveyed by said Pearsons to these plaintiffs and which said land these plaintiffs are the owners of, and which said land is described as follows, to-wit:

The unsurveyed portions of sections twenty-one and twenty-two, in township ninety two, north of range twenty-seven, west of the fifth P. M., the same being the north part of Owl Lake, so-called, lying within the bounds of the sections named above and enclosed by wire fence except on south side, also a part of Owl Lake, so-called, bounded as follows, to-wit:

Commencing on the southeast corner of section 21, in township 92, north of range 27, west of the 5th P. M., thence east 186 rods, thence south 5¾ degrees west, variation 9½ degrees, 254 rods to the main ditch now built in so-called Owl Lake, thence following the main ditch in a northwest direction to the section line between sections 27 and 28 in said township and range, thence north 30 chains and 80 links to the place of beginning, and this being part of the lands conveyed by Humboldt county to the Fort Dodge & Fort Ridgely Railroad Company as shown by paragraph 3 hereof.

Par. 8. That on September 28, 1850, when the said swamp land act referred to in paragraph 1 hereof became a law, the said lands described in paragraph 7 hereof were in fact swamp and overflowed lands within the meaning of said act of Congress, and said land was at that time and continuously until said Pearsons received the title to said land, as set out in paragraph 6 hereof, entirely unfit for cultivation without artificial drainage by reason of the same being wet, swampy, marshy and largely grown up to rank grass, reeds and rushes, and overflowed with water.

Par. 9. That in 1884 the said Pearsons by means of ditches made by him commenced to drain and reclaim said land, and in said ditching spent a large amount of money, to-wit: $.....,

and by said ditching then made a large part of said lands suitable and valuable for pasturage; and in the year 1885 the said Pearsons built a post and barb wire fence around said land and the balance of the land constituting the so-called Owl Lake, and in said year and for several years thereafter occupied and used said lands for pasturage, and in the years 1891 and 1892 the said Pearsons and the plaintiffs herein expended a large amount of money in making ditches through said tract of land and in making a large ditch for an outlet for the water on said tract of land, and thereby in said year 1892 all of said land was perfectly drained and reclaimed and made fit for cultivation and the raising thereon of all and every kind of grain and crops produced in said part of the state of Iowa.

Par. 10. That in the years 1893 and 1894 these plaintiffs plowed about 250 acres of land so conveyed to them by the said Pearsons and in the year 1894 about 175 acres were in crop and all of said land is in suitable condition to be plowed and cropped in grain; that 18 acres of said land is now sown to fall rye and about 60 acres of said land is fall plowed and ready for seeding and the balance of said land (about 250 acres) is in corn stalks and tame grass and in 1895 we intend to crop 300 acres of said land in grain and the balance of said land (about 200 acres) will be used by us in 1895 for meadow and pasture, and these plaintiffs are now in the actual possession and occupation and use of all of said land and the same is enclosed by fence except on the south side between this tract and land owned by said Pearsons, where said ditch forms the boundary.

Par. 11. That all of the above improvements, including the said ditching and fencing, were made in good faith, and the occupation of these plaintiffs and their said grantor Pearsons, was for the purpose of actual and permanent occupation and improvement of the said several portions of said land, and the aggregate cost of said improvements, including said ditching and fencing, was about $7,000.00. That in said ditching these plaintiffs have expended in the last two years the sum of about $1,000.00, and in addition to said ditching and fencing these plaintiffs have and own upon said tract of land other improvements worth not less than $700.00.

Par. 12. And plaintiffs further state that said defendants and each of them, for the purpose and with the intent to interfere with plaintiffs' possession, occupancy and use of said lands and premises, are entering upon said land and premises and threaten to enter upon and take possession of the same and to occupy, work and crop and farm the same, and said defendants have already erected a cabin on said land and threaten and intend to put in a crop on the land which plaintiffs have fall-plowed as hereinbefore mentioned, and to erect other and permanent improvements on said lands and to interfere with and prevent the plaintiffs in the use and enjoyment of their said lands and in the cultivation and use of said lands, and plaintiffs aver that unless restrained the said defendants will carry out their said threats. That said defendants are insolvent and if said threats are carried out these plaintiffs will be irreparably damaged and remediless.

Par. 13. Plaintiffs are now having said lands surveyed and platted (said tract having been originally meandered) and they are taking he necessary steps to have the said lands patented by the United States of America to the State of Iowa, and by the State of Iowa to Humboldt County, Iowa.

Wherefore, the plaintiffs pray that the said defendants and each of them, their servants, agents and employes be forever restrained and enjoined from occupying or taking possession of or trespassing upon any portion or part of said real estate and further using or cultivating or attempting to use, plow, harrow, seed or in any other manner cultivate any part or portion thereof, and from using or taking possession of the improvements thereon and from using or taking possession of any portion or part of the improvements thereon, and from in any manner interfering with or interrupting the said plaintiffs in their use and enjoyment of said premises and the improvements thereon, and that defendants be further restrained and enjoined from erecting any buildings or improvements on said lands or any part thereof, and also that a temporary writ of injunction issue in said cause, and that on the final hearing of this cause said temporary injunction be made perpetual and that plaintiffs may have such other and further relief as may be equitable in the premises and the costs of this action.

Duly verified.

EXHIBIT A.

Exhibit A is a contract made by and between the board of supervisors of Humboldt county, in behalf of the county, and the Fort Dodge & Fort Ridgely Railroad Company on the 8th day of January, 1879, whereby Humboldt county agreed to convey to said railroad all swamp lands within said county which had been, or should afterwards be patented to said county, except such swamp lands as had previously been disposed of, and the proceeds from the sale of swamp lands, in consideration of the building of said railway and the operating of the same through certain localities in Humboldt county, subject to the ratification of the electors of said county. Exhibit A further recites that in accordance with said contract, the said contract having been ratified by the electors of said county, certain portions of the swamp lands of Humboldt county were transferred to the Ft. Dodge and Ft. Ridgely Railroad Company, the conveyance being by the instrument of which Exhibit A purports to be a copy, on the 3rd day of September, 1879; said document was filed for record the same day. The contract by and between the supervisors of said county and the railroad company is as follows:

This agreement made and entered into this eighth day of January, A. D. 1879, by and between the county of Humboldt, in the state of Iowa, represented by the board of supervisors of said county, party of the first part, and the Fort Dodge and Fort Ridgely Railroad Company, a corporation organized and doing business under the laws of the State of Iowa, party of the second part; witnesseth:

First. That said county of Humboldt, for the purpose of making a railroad through the said county, commencing at the present terminus of the line of the Fort Dodge and Fort Ridgely Railroad Company in section No. thirty three (33), township No. (91) ninety-one north of range No. twenty-eight (28), west of the 5th P. M. Iowa, in said county, and thence northwardly, to a point in said county hereinafter more fully described, has this day bargained and agreed to and with the party of the second part to appropriate and devote to the above named party of the second part, all the swamp lands now belonging to the said county, and not heretofore conveyed or reserved to settlers in the said county

of Humboldt, together with all the proceeds of the said swamp lands and all the swamp indemnity lands, swamp land, scrip and money to which the said party of the first part is entitled or may hereafter become entitled under the laws of the United States, or the State of Iowa, and also all swamp lands which may hereafter be patented to the said county of Humboldt, said swamp and swamp indemnity land and scrip as aforesaid, to be conveyed by deed and delivered to the said party of the second part or any person that they may designate, upon the following terms and conditions, to-wit: The said party of the second part shall on or before September 1, 1879, build its road (a medium gauge, its present gauge) to and locate and maintain its depot upon a point on the township line, between the villages of Humboldt and Dakota, not more than forty-five rods north or south of Sumner avenue in the village of Humboldt, and Mill street in the village of Dakota, and when the road is so completed, one-half (½) of all said swamp lands and one half of the proceeds thereof, including swamp indemnity lands, swamp lands, scrip and money, to which the said party of the first part is entitled or may hereafter become entitled under the laws of the United States or of the state of Iowa, together with one-half of all the swamp lands which may hereafter be patented to the said Humboldt county, shall be conveyed by deed, and delivered to the said party of the second part, or to any person to whom the said party of the second part may designate, the selection of one-half of the lands (as nearly one-half in value as may be) and the proceeds thereof to be made by the chairman of the board of supervisors or such person as the board may select, and by an officer of the said company, to be selected by the said company, and if they are unable to agree they shall select a third disinterested party who shall select from the said lands and the proceeds thereof the undivided half, to be there conveyed and delivered as aforesaid, and his selection shall be as binding upon the parties as if the parties hereto had each severally agreed thereto in this contract, by a separate description herein.

The said party of the second part shall, on or before December 15, 1879, build its road to a point north of and not less than two miles distant from the township line, between township Nos. 92 and 93 and not more than one mile east or west of the

range line, between ranges 28 and 29 in said county, and when so built the remainder of said swamp lands and the proceeds thereof, together with the indemnity lands, swamp lands, scrip and money to which the said party of the first part is entitled or may hereafter become entitled under the laws of the United States or the State of Iowa, and all swamp lands which may be hereafter patented to the said Humboldt county, shall be conveyed by deed and delivered to the said party of the second part. It is also further agreed that whenever the said second party shall extend its road north of the last named point, it shall locate and build a depot within (80) eighty rods north or south of a point on the said line of road west of the new bridge now constructed across the east fork of the Des Moines river in Humboldt township. This contract is further subject to the rights of settlers now holding contracts of purchase from the said county, but the said party of the second part shall be entitled to any balance due on the said contracts at the time of the taking of the vote herein provided for, the evidence of the completion of the road to the first named depot shall be the commencement of the running of trains over the said road, to the said depot by the said party of the second part, and the evidence of the completion of the road to the second named place, shall be the commencement of the running of trains regularly over the said road to the point by the said party of the second part. It is further expressly agreed between the parties hereto, that said lands and the proceeds thereof above fully described, shall be taken by the said railroad company subject to the provisions of Section 988 of Revision of 1860 and to the amendments to section 986 of said revision of 1860, by chapter 77 of an act taking effect in 1862, entitled: An act amending Sec. 986 of the revision of 1860, in relation to swamp lands, and the party of the second part shall take the said lands and the proceeds thereof as above described, subject to all the provisions of the acts of Congress of September 28, 1850, and shall expressly release the State of Iowa and the county of Humboldt from liability for reclaiming the said lands, but the said contract shall not be construed to release the said county from any obligations between it and the State of Iowa, or between the State of Iowa and the general government, to do any acts contemplated by these acts of Congress or the act of the General Assembly of Iowa, passed January 13, 1853.

It is further agreed between the parties hereto, that upon the ratification of this contract by a majority of the legal voters of the said county of Humboldt, at a special election, called for the purpose, and the voting of a five per cent. tax in aid of the said railroad company upon the taxable property in at least eight townships in said county, for the year 1879, or in so many townships as the said railroad company shall accept for the vote of such aid in eight townships, then, and in that case, the said railroad company shall, within sixty days of such ratification and completion of the vote as aforesaid, file its acceptance of the said contract, and the said railroad company expressly reserves the right in case the said five per cent. tax aid be voted in less than eight townships to accept the aid given, which election to accept shall be evidenced by written notice of such acceptance filed with the county auditor of said county, within sixty days after the completion of the said votes in said county and in the townships as aforesaid, and this contract shall then be valid and legal, the same as if the said eight townships had voted the said aid, and the said company shall complete its road to the points above named and within the time above specified.

It is further agreed that in case of the ratification of this contract by a vote of the electors of said county, and the voting of the aid as above specified, if said company shall fail to build its road within the time hereinbefore stated, to the first-named depot, then this contract shall be deemed forfeited, and on the failure of the said company to build its road to the second-named point within the time named, the interests of the said company in the remaining one-half of the said swamp lands and proceeds thereof, etc., as above described, shall be forfeited, and said company shall file a release of any interest therein, but if the said company should complete the construction of its railroad to the first named depot within the time named, the contract shall be binding to the extent of one-half interest above named.

It is further expressly agreed that the said party of the first part shall execute such further conveyances and deeds as shall carry out the spirit and intent of this contract, in compliance with the conditions and provisions above named, *named*, that is upon the completion of the road to the first depot, said county shall make conveyance of the one-half interest as above stated,

to the lands and proceeds thereof, and on the completion of the road to the second point named, shall make the further conveyance on the remainder of the swamp lands, and the proceeds thereof *at* as above name l, and upon the patenting of any greater number of acres of said lands or indemnity lands, shall make such further conveyances or written instruments as shall carry out the true *interest* and meaning of this contract in every particular, between the parties thereto, and it is expressly agreed by the party of the second part that the said company will take said swamp lands and swamp indemnity lands, scrip and money as aforesaid, and all interest of the said Humboldt county in and to any additional rights or interests which may arise under the laws of the United States or the State of Iowa, in favor of the said county, except as h reinbefore specified, and if any part of said lands are now occupied by actual settlers and applied for under any resolution of the board of supervisors of said county of Humboldt by such settlers, the said lands shall be conveyed by said party of the second part to the said settlers at the appraised value, as fixed by appraisers heretofore appointed, or to be appointed by the board of supervisors of Humboldt county, Iowa, and in lieu of the said lands, the said railroad company, party of the second part, shall be entitled to the purchase-money as aforesaid, and interest thereon from the date the said company shall acquire title to said lands.

This contract shall be in full force and effect in accordance with the true intent thereof, from and after the same shall be ratified by a vote of the legal voters of Humboldt county, Iowa, as in such cases made and provided by law.

In witness whereof, this contract is, by order of the board of supervisors of the said party of the first part, signed by the chairman thereof, and attested by the clerk on behalf of Humboldt county, Iowa, and on behalf of the Fort Dodge and Fort Ridgely Railroad company by the president of the said company, and attested by the secretary of said company.

On behalf of Humboldt county, Iowa, this 8th day of January, A. D. 1879. B. H. HARKNESS,

Chairman of the Board of Supervisors of Humboldt County, Iowa.

Attest: ALEX. MCLAUGHLIN,

County Auditor and Clerk of the Board of Supervisors of Humboldt County, Iowa,

On behalf of the Fort Dodge and Fort Ridgely Railroad Company, this 8th day of January, A. D. 1879, by order of the board of directors of said company.

FORT DODGE AND FORT RIDGELY RAILROAD COMPANY,
(Seal.) By GEORGE W. BASSETT, President.
Attest:
GUS. L. PETERSON, Secretary.

EXHIBIT B.

Exhibit B purports to be a copy of a deed or conveyance to the Fort Dodge and Fort Ridgely Railroad Company of the remaining half of the swamp lands of Humboldt county, described as follows: The unsurveyed portions of sections 21, 22, 27, 28, in township 92, north range 27 west of the 5th P. M.; also the unsurveyed portions of sections 18, 19, 33, 34, in township 91, north of range 29, west of the 5th P. M.; also the unsurveyed portions of sections 13 and 24, in township 91 north, of range 30 west, of the 5th P. M.; also the north half of the northeast quarter of section 29, township 93 north, range 27 west, of the 5th P. M.; also the south half, the southwest quarter and the northeast quarter of southeast quarter of section 31, township 93 north, range 28 west, of the 5th P. M., said deed being from the board of supervisors of Humboldt county, in behalf of said county, and dated September 1, 1884, and filed for record on September 6, 1887.

EXHIBIT D.

Exhibit D purports to be a copy of a deed from the Fort Dodge & Fort Ridgely Railroad Company of the lands described in Exhibit B, to A. McBane, dated December 15, 1884.

EXHIBIT C.

Exhibit C purports to be a copy of a deed from A. McBane and Elizabeth McBane to Geo. R. Pearsons of the lands described in Exhibit B, dated Dec. 19, 1884, and filed for record March 4, 1885.

And on the 5th day of October, 1895, defendants filed the following

ANSWER.

Come now the defendants in the above entitled action and for answer state:

Par. 1. Deny each and every allegation contained in paragraphs 1, 2, 3, 8 and 12 of plaintiff 's petition.

Par. 2. That defendants have neither knowledge nor information sufficient to form a belief as to the allegations contained in paragraphs 4, 5, 6, 7, 9, 11 and 13 of plaintiff 's petition.

Duly verified.

And on the 15th day of November, 1895, intervenor, The State of Iowa, filed the following:

PETITION OF INTERVENTION.

Comes now the State of Iowa and by leave of the court files its petition of intervention in said cause and shows the court that it claims an interest in the matter in controversy as against both the plaintiffs and the said defendants.

The said intervenor alleges:

1. That the land described in the said petition of the said plaintiffs was and is a part of a lake bed of a lake known as Owl Lake, lying wholly within the State of Iowa, and the same did not constitute any part of the land which the United States government was authorized or empowered to sell.

2. That the State of Iowa was duly admitted into the Union and became a sovereign state in the year 1846, and as such sovereign state became and was the owner of all the lakes within its borders, subject to the right of the public to use the same and for the use of the public, and the title to the soil under said lake was and is in the said state.

3. That in surveying the public lands adjoining the said lake, the same was meandered and said land adjoining said lake, up to said meander lines, was sold by the government of the United States to divers different persons, and after such survey and sale of said land, the government of the United States had no right, title or interest in and to any part of the lake bed aforesaid, but all interest, either legal or equitable, held by the United

States Government had passed to the State of Iowa upon its admission as a sovereign state.

4. Said intervenor specially denies that the land described in plaintiff's petition was within the grant of the act of Congress approved September 28, 1850, known as the swamp land grant. Said intervenor further denies that the said lands described in plaintiff's petition were within the grant of the State of Iowa to several counties of the State, under and by virtue of the act of the legis ature, approved January 13, 1853, or under the act approved January 5, 1855, and also denies that the same was embraced within the terms of the contract between Humboldt county and the Fort Dodge and Fort Ridgely Railroad Company, and denies paragraph 4 of said plaintiffs' petition.

5. That whether or not the deeds referred to as Exhibits C and D, attached to plaintiff's petition, were in fact executed, the said intervenor has no knowledge or information sufficient to form a belief, but avers that the grantors of the said deeds were without any right, title or interest whatsoever in and to the said premises because the same were the property of the intervenor aforesaid.

6. Said intervenor further avers that said Owl Lake as aforesaid, in which the said lands described in said plaintiffs' petition were embraced was a lake in fact, and that the same by the wrongful and unlawful acts of the said plaintiffs, or some other persons unknown, has been unlawfully drained by cutting in ditches which have drawn the water of said lake therefrom, and each and every act of plaintiffs, or by whomsoever done, in draining said lake and cutting ditches therein was unlawful and without any right or color of right on the part of said plaintiffs, or the persons so doing the same, and gave the plaintiffs or such other persons no right or interest whatsoever in the said land thus drained.

7. Plaintiff avers that any act either in draining of said lake, or in entering upon possession of the said land thus drained, done either by the plaintiff, his agent or grantors, or by the defendants or either of them, was without any right, title or authority whatsoever; and any improvement put upon such lands thus drained by either the plaintiff or the defendants, or either of them, was at their own peril and without authority for so doing.

Wherefore, the said intervenor prays that a decree be entered as against both plaintiffs and the said defendants quieting the title in and to the said premises in the said intervenor, and that a writ of possession issue herein removing the said plaintiffs and the said defendants, or their agents, tenants or employes, from the said premises, and for such other and further relief as equity and good conscience may require.

And on the 18th day of November, 1895, defendants filed the following

AMENDMENT TO ANSWER.

Come now the defendants, George A. Wallace, George S. Wallace et. al., in the above entitled action, and for amendment to answer therein state:

COUNT 2.

Par. 1. That on or about the.. ..... day of. .... A. D. 1895, these defendants being advised and believing that the lands within the meander lines of what is known as Owl Lake, situated in township 92, north of range 27, Humboldt county, Iowa, were unsurveyed lands of the United States and subject to entry by settlers, did for the purpose of securing for themselves homes and improving and living upon same, enter and settle upon certain lands within the limits of the meander lines of said Owl Lake, built thereon houses and occupied the same as homes. That these defendants have since entering upon said lands, held the same as homes and held themselves out to the public as occupying claimants of public lands of the United States.

Par. 2. That the defendants herein settled upon and claimed for a home under the laws of the United States the following described premises, to-wit: SE¼ nw¼ and ne¼ sw¼ and sw¼ ne¼ and nw¼ se¼ section 27, township 92, range 27, Humboldt county, Iowa, and George S. Wallace sw¼ section 22, township 92, range 27, and that they claim the same under and by virtue of the preemption and homestead laws of the United States. That the lands upon which they settled were at that date unsurveyed lands of the United States.

Par. 3. Defendants further allege that on the 28th of

September, 1850, the date of the act of Congress granting to the State of Iowa and other states certain swamp and overflowed lands within their respective limits for the purpose stated in said act, the lands comprised within the limits of the meander lines of Owl Lake, located in township 92, range 27, Humboldt county, Iowa, were covered by a body of water from six to fifteen feet in depth. That said lake had well defined shores and high banks on the south and east sides thereof and that said lake was then and up to the time it was drained from six to fifteen feet in depth and navigable by ordinary steamboats. That the same was not at the date of said grant of swamp lands and was not at any time thereafter swampy and that said lands comprised within the limits of the meander lines of said Owl Lake did not come within the meaning of said grant as "swamp and overflowed" lands.

Par. 4. These defendants further aver that whatever rights plaintiffs may have in the land above described, they are junior and inferior to those of these defendants.

Wherefore, defendants ask that plaintiffs' petition be dismissed with costs of suit; that defendants be decreed to be rightfully in possession of said premises as settlers upon unsurveyed lands of the United States in good faith, and entitled to all the rights accruing to them as such settlers, and have such other and further relief as they may in equity be entitled.

Duly verified.

And on July 23, 1896, plaintiffs filed the following

AMENDMENT TO PETITION..

Come now the plaintiffs and amend their petition in the above and foregoing cause of action, by stating that since the commencement of the above entitled suit the lands described in the petition have been patented by the United States to the State of Iowa, as inuring to the State of Iowa, under the swamp land act of the year 1850; that said patent has been duly filed for record in the office of the recorder of deeds of Humboldt county, Iowa, and recorded in deed book ....., on page ....., on the .....day of.... ...., A. D. 189...; that thereafter and on the.....day of..... ....., A. D. 189..., the State of Iowa duly patented said lands to Humboldt county, Iowa, which said

patent was duly filed for record in the office of the recorder of deeds of said county, on the.....day of....., A. D. 189..., and duly recorded in book .....of deeds, and page..... thereof; and that by reason of the premises alleged in said petition and this amendment thereto, the ownership of said real estate is now vested in these plaintiffs.

Wherefore the plaintiffs renew the prayer of their petition.

Duly verified.

And on the 25th day of July, 1896, plaintiffs filed the following:

ANSWER TO PETITION OF INTERVENOR.

Come now the plaintiffs and answer the petition of intervention as follows:

I. DEFENSE.

They deny each and every allegation in said petition of intervention contained, except as the same are hereinaf er admitted.

1. They admit that the land described in plaintiffs' petition was formerly a part of what was called the bed of Owl Lake, lying wholly within the State of Iowa.

2. They admit that the State of Iowa was admitted into the Union, as a State, in the year 1846.

3. They admit, that in surveying a portion of the lands adjoining the so-called lake, the same was meandered, and said land adjoining said lake up to the said meander lines, was sold by the government of the United States to divers persons.

4. They admit that said so-called lake has been drained and the water drawn therefrom.

II. DEFENSE.

For other and still further defense to said petition of intervention, the plaintiffs state:

That the lands in controversy formerly formed a part of the swamp and overflowed land located in said Humboldt county, and as such the title to the same was in the United States.

That by the proper officer of the government, and by the tribunal provided by law, and on evidence properly before it, the

character, quality and condition of said lands were duly adjudicated in the manner provided by law, and the title formerly held by the United States passed to Humboldt county through the patents mentioned in the amendment to plaintiffs' petition, and by and through the contracts made by Humboldt county to the grantors of the plaintiffs, the same has inured to the benefit of these plaintiffs, and said patents have never been set aside, nor cancelled, nor has any proceeding ever been commenced, to which the United States was or is a party, looking to such setting aside or cancellation.

III. DEFENSE.

For other and still further defense to said petition of intervention the plaintiffs state:

That on the.....day of....., A. D. 1895, the said intervenor duly patented the said lands to Humboldt county, Iowa, as swamp land, and the said patent at once inured to the benefit of said plaintiffs, under the contracts and deeds made by the said county to their grantors, and which are set out in plaintiffs' petition.

That said patent conveyed whatever title the State had to said land at the time of the execution of the same, and said patent has never been set aside nor cancelled.

IV. DEFENSE.

For other and still further defense to the petition of intervenor the plaintiffs state:

That since this action was commenced, and in the spring of 1895, with the knowledge, acquiescence, and the encouragement of said intervenor, these plaintiffs, in order to prove the character of said land as being swampy or otherwise, at great cost and expense, procured affidavits of many residents of Humboldt county, who had known the said lands for many years, as to its swampy character.

That said affidavits were submitted to the governor of the state of Iowa, who, under the provisions of chapter 138 of laws of the 5th general assembly of Iowa, is authorized to adopt such means as to him may seem expedient to provide for the selection of the swamp lands of the state, and to secure to the state the title to the same.

That said intervenor, by its governor, who deemed the showing made by said affidavits to be sufficient to show that said lands were of a swampy character, and inured to the State of Iowa, under the swamp land act of the year 1850, did, agreeably to the provisions of chapter 84 of volume 9, United States Statutes at Large, request the Secretary of the Interior to patent the said lands to the State of Iowa.

That relying upon the good faith of the state in asking the United States government to patent said lands to it as swamp lands, and believing that the State of Iowa would, after the said lands were patented to it as swamp lands, patent the same, as swamp lands, to the county of Humboldt; and that it would not, after asking the United States government to patent the lands as swamp lands to itself, and after it had patented the same as swamp lands to Humboldt county, ever claim that the lands thus patented were not swampy, they submitted to the Commissioner of the Land Office of the United States, affidavits, and made their showing before said commissioner as to the swampy character of said lands; that this was done by them at great cost and expense, and the showing thereby made by them was, by the land department of the United States, deemed sufficient to prove that the said lands were swampy, and passed to the State of Iowa, under the swamp land act of the year 1850; and accordingly, the said land was on the.....day of....., 1895, patented by the United States to the State of Iowa, as swamp land; that on the.....day of..... ...., 1895, the said land was by the State of Iowa patented as swamp land to Humboldt county; and plaintiffs aver that the State of Iowa is now estopped to claim that title to the said lands was not in the United States in the year 1850, or to claim that said lands were not of a swampy character, or to claim that the same did not pass under the said patent, made by the United States to the State of Iowa, or to claim that intervenor, after making its own patent to Humboldt county, purporting to convey the said lands as swamp lands, is now the owner of said lands, or has any right, title, interest claim or demand in or to the same.

And on November 28, 1896, the following stipulation, signed by all parties to this action, was filed:

STIPULATION.

It is hereby stipulated that the following facts are admitted and that this stipulation may be introduced on the trial to prove the same, to-wit:

That the defendants settled or squatted on the land—each upon the land described in his own answer and the amendment thereto—with the intention to acquire ownership thereof under the homestead or pre-emption laws of the United States in case the ownership could be thus acquired, the defendants treating the land as the unsurveyed lands of the United States.

And on the 2d day of December, 1896, the intervenor filed the following

REPLY OF INTERVENOR.

Comes now said intervenor and denies each and every allegation of the plaintiffs' answer which is inconsistent with the said intervenor's petition. The said intervenor, for further reply, avers that any and all patents issued by the land commissioner or others in the name of the United States to the State of Iowa, and any and all acts of the Governor of Iowa in requesting the said alleged patents to be issued to the state, and in issuing a patent to Humboldt county, if any was issued, were without authority of law and all such acts were done at the instance and by the procurement of the said plaintiffs and upon the *ex parte* affidavits procured and prepared by said plaintiffs for the purpose of inducing the said governor to take the action requested by said plaintiffs as aforesaid.

Wherefore said intervenor says it is neither bound nor estopped by the acts of said governor.

PARAGRAPH 7.

Paragraph 7, in the case of George R. Pearsons vs. A. F. Johnson et. al., is as follows: That said land consisted of the following described lands, viz: Those unsurveyed portions of section 27, which if surveyed, would constitute the n½ of the sw¼ and the s½ of the nw¼ of section 27, township 92 north, of range 27 west, of the 5th P. M., Iowa, being a part of the lands conveyed as aforesaid by Humboldt county to the Fort Dodge & Fort Ridgely Railroad Company, as shown by paragraph 4 hereof.

Paragraph 7 in the case of Pearsons vs. Wallace et. al., is as follows: That said land consists of the following described lands, to-wit: The unsurveyed portions of sections 27 and 28, in township 92 north, of range 27 west, of the 5th P. M.

Paragraph 7 in the case of Rood et. al. vs. Barrett et. al., is as follows:

Par. 7. That thereafter and on the.....day of..... 1892, the said George R. Pearsons, by deed in writing conveyed the said land to the plaintiffs in this suit, and which said land these plaintiffs are now owners thereof, and which said land is described as follows:

The unsurveyed portions of sections 21 and 22, in township 92 north of range 27 west of the 5th P. M., Iowa, the same being the north part of Owl Lake, so-called, lying within the bounds of the sections named above, and enclosed by wire fence, except on the south side.

Also a portion of Owl Lake, so-called, bounded as follows, to-wit:

Commencing on the southeast corner of section 21 in township 92 north of range 27 west of the 5th P. M., Iowa, thence east 186 rods; then south five and three-quarter degrees west, variation 9½ degrees, 254 rods to the main ditch now built in the so-called Owl Lake; then following the main ditch in a northwesterly direction to the section line between sections 27 and 28, in said township and range; thence north 30 chains and 80 links to the place of beginning. The same being part of the lands conveyed by Humboldt county to the Fort Dodge and Fort Ridgely Railroad Company as shown by paragraph 3 hereof.

Paragraph 7 in the case of Rood et, al. vs. O'Connell et. al. is as follows:

Par. 7. That thereafter and on the.. .....day of..... 1898, the said George R. Pearsons, by deed in writing, conveyed the said land to the plaintiffs in this suit, and which said land these plaintiffs are now owners theroof, and which said land is described as follows:

The unsurveyed portions of sections 21 and 22 in township 92 north of range 27 west of the 5th P. M., Iowa, the same be-

ing the north part of Owl Lake, so-called, lying within the bounds of the sections named above and enclosed by wire fence except on the south side.

Also a portion of Owl Lake, so-called, bounded as follows, to-wit:

Commencing on the southeast corner of section 21 in township 92 north of range 27, west of the 5th P. M., Iowa, thence east 186 rods; then south five and three-quarters degrees west, variation 9½ degrees, 254 rods to the main ditch now built in the so-called Owl Lake; then following the main ditch in a northwesterly direction to the section line between sections 27 and 28, in said township and range; thence north 30 chains and 80 links to the place of beginning, the same being part of the lands conveyed by Humboldt county to the Fort Dodge and Fort Ridgely Railroad Company as shown by paragraph 3 hereof.

JUDGMENT.

And after listening to the evidence and the argument of the counsel, and on the 11th day of February, A. D, 1897, the District Court of Humboldt county, Iowa, filed a decree and judgment dismissing intervenor's petition, and at intervenor's cost, and quieting the title in each case in the plaintiffs respectively, to which judgment and decree defendants and intervenor excepted at the time.

And thereafter said case was appealed to the Supreme Court of the State of Iowa, and at the January term, A. D. 1899, said cause was duly submitted to the Supreme Court of Iowa, and the case having been fully considered, said court did, on the 26th day of May, 1899, file its written decision, the same being in words and figures following, to-wit:

DEEMER, J.

The township in which the land in controversy is situated, was surveyed and platted by the General Government in the fall of the year 1851. What was denominated upon the plats as "Owl Lake," was meandered, and the land adjacent thereto was sub divided into regular and irregular tracts. Some of the lots were designated as "swamp lands," and all of the tracts surveyed were sold

to various parties many years before this litigation began. At some places this lake had well-defined banks and shore lines, and at other places it had no banks, but diverging into a slough or low wet lands. It had some clear water, but, as a general rule, was filled with rank weeds, water lillies and rushes. In the year 1884, plaintiffs dug a ditch which drained off much of the water, and in 1894 this ditch was deepened and widened, with the result that the land is now almost wholly fit for cultivation. In January of the year 1879, the county conveyed all of its remaining swamp lands to the Fort Dodge and Fort Ridgely Railroad Company. In 1895, plaintiffs, having previously obtained a title or claim of title to the land through certain mesne conveyances from Humboldt county and having drained the same, applied to the then governor to request the Land Commissioner of the United States land office to issue a patent for the land in controversy to the State under the act of Congress hitherto mentioned. The request was made and granted, and a patent was issued to the State. The governor thereupon issued a patent to the county under date of April 30, 1895. Humboldt county was not organized until January 15, 1857. The character of the so-called "lake" is a matter of much dispute. Some of the witnesses describe it as a shallow lake, while others say that it was marsh or swamp land. The State makes the following contentions regarding the ownership of the land: (1) That the lake beds of all meandered lakes and streams in the State belong to the State of Iowa, in trust for the public, by virtue of its sovereignty, and this right does not depend upon any act of Congress or grant from the United States. (2) That the survey of the public lands of the United States, the approval of such survey by the Land Commissioner of the United States and the Secretary of the Interior, and a sale of the lands under such survey fixes the status of the meandered lake and streams, except in cases of palpable mistake or fraud, beyond recall by any subsequent act of the Land Department. (3) That the Land Commissioner of the United States Government had no authority by act of Congress or under the Constitution to patent to the State of Iowa any lake beds which had been meandered and were already the property of the State. (4) That the Governor of the State of Iowa was unauthorized by any laws to request the Land Commissioner of the United States to issue a patent for the land in

controversy, and hence the two patents, first from the United States to the State of Iowa, and from the State of Iowa to Humboldt County, were wholly void.

We are quite ready to assume, as a general proposition, that the title to all the lake beds in the state, especially those of navigable lakes, is in the state, and that the General Government never had any control or ownership thereof. Indeed, this seems to be the almost unbroken voice of authority. Pollard's Lessee vs. Hagan, 3 How., 212; Withers vs. Buckley, 20 How., 92; Shively vs. Bowlby, 152 U. S., 1; 14 Sup. Ct., 548; Mann vs. Land Co., 153 U. S., 273; 14 Sup. Ct., 820; Knight vs. Association, 142 U. S., 161; 12 Sup. Ct., 258; Illinois Cent. R. Co. vs. Illinois, 146 U. S., 387; 13 Sup. Ct., 110; Gunter vs. Geary, 1 Cal., 463; Hinman vs. Warren, 6 Or., 408; Haight vs. City of Keokuk, 4 Iowa, 199; Hardin vs. Jordan, 140 U. S., 371; 11 Sup. Ct., 808, 838; Veazie vs. Moor, 14 How., 568; Noyes vs. Collins, 92 Iowa, 566; 61 N. W., 250; Lamprey vs. Metcalf, (Minn.), 53 N. W., 1139. But when, how, and by whom is the question of whether the land is a lake bed to be determined? The attorney-general contends that this is done at the time the original survey is made, by the approval of the survey, and the sale of the lands with reference thereto. At the time the original survey was made the following was one of the rules promulgated for instruction of surveyors: "You are also to meander, in manner aforesaid, all lakes and deep ponds of the area of 25 acres and upwards, also all navigable bayous; shallow ponds, readily drained or likely to dry up, are not to be meandered." Lester, Land Laws (ed. 1860), p. 714. And while the instructions require a plat of the township to be made designating swamp lands, streams, etc., and that the plats for the township be approved by the Surveyor General, the Commissioner of the Land Office, and, in case of controversy, by the Secretary of the Interior, yet prior to April 17, 1879, it was not the practice of the Land Department to acquire any specific approval by the Commissioner of either the surveys or the plats. Tubbs vs. Wilhoit, 138 U. S., 142; 11 Sup. Ct., 279. Moreover, the requirement as to the approval was simply a rule of the department, which might be waived. It did not have a statutory sanction. But suppose that the Surveyor General and the Land Commissioner did approve the plat of the original survey, is this conclusive upon the par-

ties? That question seems to be answered by our own cases. See Grant vs. Hemphill, 92 Iowa, 218; 59 N. W., 263; and 60 N. W., 618; Bigelow vs. Hoover, 85 Iowa, 161; 52 N. W., 124; Glenn vs. Jeffrey, 75 Iowa, 20; 39 N. W. 160. In these cases the original survey was not given the force of an adjudication, but the fact as to the character of the land was determined by evidence alike. The Attorney General frankly concedes that the General Government may have a resurvey in case of fraud, palpable mistake, or for some other causes, but he contends no such resurvey can be made after the first survey has been approved and lots sold with reference thereto. No doubt this is a general rule, but who may complain of this resurvey? Surely not the State; or if the General Government has power to order a resurvey because of a mistake, it also has power to determine whether there has been a mistake. Purchasers of lots abutting on the meandered line or otherwise directly interested are, it seems to us, the only persons who may object to the resurvey, and no resurvey will be permitted which will in any manner prejudice their interests. They, as we have seen, are not made parties to this suit and are making no objection to plaintiffs' title. The case of Moore vs. Bobbins, 96 U. S., 530, and other like cases, relied on by appellant, relate to the power of the General Government over lands to which it has issued a patent, and it is there held that the functions of the executive department cease when the title has passed from the General Government. As to the power and right of the Secretary of the Interior to set aside a survey or to order unsurveyed lands surveyed, see Knight vs. Association, 142 U. S., 161; 12 Sup. Ct., 258; Cragin vs. Powell, 128 U. S., 691; 9 Sup. Ct., 203; Railroad Co. vs. Butler, 159 U. S., 87; 15 Sup. Ct., 991.

In the first case it is said: "It is a well settled rule of law that the power to make and correct surveys of the public lands belongs exclusively to the political department of the Government, and that the action of that department within the scope of its authority is unassailable in the courts except by a direct proceeding." Cragin vs. Powell, 128 U. S., 691, 699; 9 Sup. Ct., 203, and cases cited. Under this rule it must be held that the action of the land department in determining that the Von Leicht survey correctly delineated the boundaries of the pueblo grant as es-

tablished by the confirmation decree, is binding in this court, if the department had jurisdiction and power to order that survey. It is claimed, however, and the referee so determined, that no such power or authority existed in the department, because it had been exhausted by the action of the commissioner of the general land office in approving and confirming the Stratton survey in 1878. This contention is based upon the proposition that the Secretary of the Interior had no authority to set aside the order of the Commissioner approving and confirming the Stratton survey, especially in view of the fact that no appeal was taken from such order and the authorities of the city acquiesced in that survey. This proposition is unsound. We conclude on this branch of the case, that the Secretary of the Interior had ample power to set aside the Stratton survey and order a new survey by Von Leicht, and that his action in such matter is unassailable in the courts in a collateral proceeding. The Von Leicht survey, therefore, must be held as a correct survey of the pueblo claim as confirmed by the circuit court. Moreover, the method of running the shore line of the bay of San Francisco, adopted by the Von Leicht survey, was approved by the circuit court itself in Tripp vs. Spring, 5 Sawy, 209, Fed Case No. 14180, and on this point we entertain no doubt. There seems to be no doubt that the Secretary of the Interior had the right, in so far as the parties to this suit are concerned, to redetermine the question as to whether or not the land in question was a part of the lake bed or was covered by the so-called "Swamp Land Act." And this brings us to the next question, What force is to be given the determination of the land commissioner that the land was in fact swamp land, and what effect is to be given the patent issued to the State? That question seems to be answered by Rogers Locomotive Mach. Works vs. American Immigrant Co., 164 U. S., 559; 17 Sup. Ct., 188. In that case it is held that a decision of the Secretary of the Interior, to the effect that certain lands did not pass as swamps under the act of 1850, and the acceptance and transfer of them by the State was conclusive upon one who claimed title under the swamp land act. Again, in French vs. Fryan, 93 U. S., 169, that court said that "by the second section of the swamp land act the power and duty devolved upon the Secretary of the Interior, as the head of the department which administered the

affairs of public lands, of determining what lands were of the description granted by that act, and made his office the tribunal whose decision on that subject was to be controlling." See, also, as sustaining the same conclusion, Chandler vs. Mining Co., 13 Sup. Ct., 798; McCormick vs. Hayes, 159 U. S., 332; 16 Sup. Ct., 37. In Steel vs. Refining Co., 106 U. S., 447; 1 Sup. Ct., 389, we find this language: "That department, as we have repeatedly said, was established to supervise the various proceedings whereby a conveyance of title from the United States to portions of the public domain is obtained, and to see that the requirements of the different acts of Congress are fully complied with. Necessarily, therefore, it must consider and pass upon the qualifications of the applicant and the acts he is to perform to secure title, the nature of the land, and whether it is of the class open to sale. Its judgment upon these matters is that of a special tribunal, and is unassailable except by direct proceedings for its annulment or limitation." As the Land Department determined the lands in controversy to be swamp and issued its patent to the State accordingly, that determination is conclusive and the patent cannot be collaterally attacked. Steel vs. Refining Co., *supra;* Wright vs. Roseberry, 121 U. S., 488; 7 Sup. Ct., 985; Minter vs. Crommelin, 18 How., 87.

The State further claims that plaintiffs have not made out their chain of title, in this: that they have not shown that the conveyance from the county to the Fort Dodge Railroad Company was ratified by the vote of the people. It may be that the evidence on this point is insufficient, but the record does show that plaintiffs are in possession of the land under claim of title. The State intervened and asked relief against them. As they are in possession, and were at the time this suit was commenced, the intervenor must recover on the strength of its own title and not on the weakness of its adversaries'. If the State has no title, its petition of intervention should be dismissed without regard to the title under which the plaintiffs claim. Their possession is a sufficient defense to the petition of intervention, for the State cannot rely upon title in a third person to defeat plaintiffs' recovery.

Lastly, it is said that the Governor of the State has no authority to request the Land Commissioner to issue a patent for

the land in controversy, and that the patent to the State and from the State to the county are void. His authority in the premises is conferred by the act of the general assembly, passed January 25, 1855, which reads as follows: "The Governor is "hereby authorized to adopt such measures as to him may seem "expedient to provide for the selection of the swamp lands of this "state, and to secure to the state the title to the same, and also for "the selection in the name of the state of other lands in lieu of "such swamp lands as may have been or may hereafter be entered "with warrants." See Acts 5th Gen. Assem., c. 138, sec. 3. Whenever question arose as to the character of land such as that in dispute, it was certainly competent for the governor to submit the matter to the only authority that had original jurisdiction in the matter, and, having so submitted it, that decision is final. If there was no real dispute as to the character of the land—if, for instance, the property was a part of the bed of any of the navigable rivers of this state, or if it was property that was clearly lake bottom—it may be that the governor would not be justified in submitting the matter as to its character to the land department, and if he did so, and the land department found that the land was swamp when surveyed, such conclusions would be null and of no effect; but when there is a fair dispute as to the character of the land when originally surveyed, surely, the land department has the right to determine the dispute, and, as a general rule, its decision is binding until set aside by direct attack. The whole case, in our judgment, turns upon the effect to be given the original survey. If that is conclusive, it amounts to a segregation of the lakes and river beds from the public domain, and, as a general rule, confirms the title thereto in the state. If the survey is not conclusive, but is simply administrative or advisory, then the Land Department has the right, at some future day, to determine its character and cause a patent to issue accordingly; and when this is done the finding is not subject to collateral attack. As has been said, we do not regard the original survey conclusive. There may be a re-survey, or an independent investigation as to the character of the land, and as a special tribunal is provided for that investigation, its determination is ordinarily conclusive. It follows from what has been said that the decree of the District Court is correct, and it is affirmed.

ASSIGNMENTS OF ERROR.

Now comes the State of Iowa, intervenor in the suit referred to in the attached petition for writ of error, by its authority, Milton Remley, and says that in the record and proceedings had in the Supreme Court of the State of Iowa in said suit, in which it is appellant and Rood et. al. are appellees, there is manifest error in this, to-wit:

1.

The court erred in not holding that the lake beds of all meandered lakes and streams in the State of Iowa belong to said State in trust for the public by virtue of its sovereignty, and that this right does not depend upon any act of Congress or grant from the United States.

2.

The court erred in holding that the survey of the public lands of the United States, the approval of such survey by the Land Commissioner of the United States and the Secretary of the Interior, and a sale of the lands under such survey did not fix the status of the meandered lakes and streams, except in cases of palpable mistake or fraud, beyond recall by any subsequent act of the Land Department.

3.

The court erred in not holding that the Land Commissioner of the United States Government had no authority by act of Congress or under the Constitution to patent to the State of Iowa any lake beds which had been meandered and were already the property of the State.

4.

The court erred in holding that the Land Commissioner of the United States had authority to take jurisdiction of the lake beds and to reinvestigate the question after the lapse of forty-four years, and to issue a patent therefor, notwithstanding the alleged request of the Governor so to do.

5.

The court erred in holding that the patent issued for unsurveyed lake beds in the State of Iowa could not be attacked or investigated by the courts; that the issuance of said patent was a finality, binding and conclusive upon the parties, especially the State of Iowa.

6.

The court erred in holding that the Constitution of the United States and the acts of Congress prohibited the State of Iowa from questioning the legality of the acts of the Land Commissioner in taking cognizance of the lake in question, which had been segregated as a lake from the public lands of the United States in 1851, and issuing a patent therefor under the swamp land act, and that the state was bound by the acts of the Land Commissioner in executing such patent.

7

The court erred in holding that the patent to the lake bed in question could not be attacked by the courts of the State, and that the same was final and conclusive as against the State.

Wherefore the State of Iowa prays that the judgment of the Supreme Court of the State of Iowa be reversed.

The above and foregoing, we think, sufficiently states the case for the purposes of said motion.

R. M. WRIGHT,
Counsel for the Defendants in Error.

BRIEF AND ARGUMENT UPON MOTION TO DISMISS.

The points relied upon by the plaintiff in error for a reversal of this case in the Supreme Court of Iowa, were four in number, and were substantially as follows:

1. That the Governor of the State of Iowa had no authority to request the Interior Department of the United States to issue a patent to the State, and, therefore, the State had no power or authority to issue a patent to Humboldt county.

2. That the lake beds of all meandered lakes and streams of the State of Iowa belong to the State of Iowa, in trust for the public, by virtue of its sovereignty, and this right does not depend upon any act of Congress or grant from the United States.

3. That the Secretary of the Interior had no authority, by act of Congress or under the Constitution, to patent the land to the State of Iowa.

4. That the survey of the public lands of the United

States, and the approval of such survey by the Land Commissioner and the Secretary of the Interior of the United States, and the sale of lands under such survey, fix the *status* of the meandered lakes and streams, except in cases of palpable mistake or fraud, beyond recall by any subsequent act of the Land Department.

The above named points will in this argument be noticed in connection with the assignments of error.

I.

FIRST ASSIGNMENT OF ERROR.

The Court erred in not holding that the lake beds of all meandered lakes and streams in the State of Iowa belong to said State, in trust for the public, by virtue of its sovereignty, and that this right does not depend upon any act of Congress or grant from the United States.

The Supreme Court did not hold the above question adversely to the plaintiff in error, on the contrary (*supra* page 26), it says: "We are quite ready to assume as a general proposition "that the title to all the lake beds in the state, especially those "of navigable lakes, is in the state, and that the general govern-"ment never had any control or ownership thereof. Indeed, this "seems to be the almost unbroken voice of authority." The thought of the Supreme Court of Iowa was this: It recognized that originally the dry lands, the swamp lands, the navigable lakes and the non-navigable lakes were all within the territory of the United States undelimited one from the other. It recognized that the power to make delimitation, i. e, to separate the public domain from the navigable waters and lake beds was in the United States, and that by and under the laws of the United States one of the functions of the Land Commissioner and Secretary of the Interior of the United States was, by appropriate government surveys, to do this very thing, i. e., to separate the public lands, that is, the lands that might be disposed of by the United States, from the lake beds and navigable waters which might not be so disposed of. Recognizing these facts, the Supreme Court of Iowa then determined and held that as between the State and the Land Department of the United States (in the absence of the intervening rights of innocent third parties owning

lands abutting upon or adjacent to the so called lakes) said Land Department had the right and authority to re-examine and re-investigate the question as to the State's right to such lake beds and to determine the question against the so-called right of the State to said lake beds.

What the powers of the Governor of the State of Iowa are in matters which concern the State of Iowa, is a question solely within the cognizance of the Constitution and laws of the State of Iowa as construed by the Supreme Court of Iowa. The act of the General Assembly of Iowa, passed January 25, 1855, reads as follows:

"The Governor is hereby authorized to adopt such measures "as to him may seem expedient to provide for the selection of the "swamp lands of this State, to secure to the state the title to the "same; also for the selection, in the name of the State, of other "lands in lieu of such swamp lands as may have been or may "hereafter be entered with warrants." In the case at bar the Supreme Court of Iowa says, "It was certainly competent for the "Governor to submit the matter to the one authority that had "original jurisdiction in the matter."

The Land Department of the United States, under the laws of the United States, is the authority to whom proof of the swampy or non-swampy character of lands is to be submitted. It is that department, which, under the law, passes upon the proof so submitted and which issues the patent.

If the decision of the Land Department in the case at bar was erroneous, said department simply exceeded its power, and such error cannot be corrected in this collateral proceeding. The decision of the Supreme Court of Iowa did not draw in question the validity of a treaty or statute of, or an authority exercised under, the United States, nor did it thereupon decide against the validity of such treaty, statute or authority so exercised. It decided, if it decided anything, in favor thereof.

The Supreme Court of Iowa did not draw in question the validity of the statutes or authority exercised under any state on the ground of their being repugnant to the Constitution or laws of the United States. Whatever was decided was in favor of the laws of the United States.

Again, the said Supreme Court was not bound to hold that the beds of the non-navigable, meandered lakes belong to the State of Iowa, in trust for the public, by virtue of its sovereignty; it might have held, as courts in many of the states have held, that the beds of such lakes belong to the riparian owners and not to the state.

This court has decided that the question of ownership of the beds of non-navigable, meandered lakes is a question for the determination of the states wherein the said lakes are situated. It is a question of state law. and is to be determined solely by such law.

Eldridge vs. Trezovant, 160 U. S., 452
St. Anthony Falls Water Power Company vs. St. Paul Water Commission, 168 U. S, 349.
Jersey City, etc, Railroad Company vs. Morgan, 160 U. S., 288.
Bartlett vs. Lockwood, 160 U. S., 357.
Hardin vs. Jordan, 140 U. S., 371.
Kaukauna Water Power Co., vs. Green Bay and Mississippi Canal Co., 142 U. S., 254.
Shively vs. Bowlby, 152 U. S., 1.
Lowndes vs. Huntington, 153 U. S, 1.

Under the theory of the plaintiff, the right of the State of Iowa to these lake beds is not claimed under the Constitution of the United States, nor under any treaty or statute of, or commission held, or authority exercised, under the United States, but its right is claimed to be a part and parcel of the State's inherent sovereignty, and as such, is an independent right. "When the "Revolution took place the people of each state became themselves sovereign: and in that character held the absolute right "to all their navigable waters and the soils under them for their "own common use, subject only to the rights since surrendered "by the Constitution to the General Government."

Shively vs. Bowlby, 152 U. S., 16.

The new states since admitted into the Union have the same rights, sovereignty and jurisdiction in that behalf as the original states possess within their respective borders.

Shively vs Bowlby, 152 U. S, 30.

Now the record in this case shows that the so-called Owl Lake was a non-navigable lake.

Plaintiff in error claims that the title to the beds of meandered, non-navigable lakes is in the State exactly the same as is the title to the beds of its navigable waters. If this be so, it must certainly be true that the right to such lake beds was never surrendered by the Constitution to the General Government, because with the beds of non-navigable lakes the Constitution can have no concern; the United States can have no possible interest in them. This being so, there can be no federal question in this case; it cannot be said that the Supreme Court of Iowa has decided in this case adversely to any right, title, privilege, or immunity claimed under the Constitution of the United States, nor under any treaty or statute of, or commission, or authority exercised, under the United States. In other words, the plaintiff in error cannot say, in the same breath, that there is and there is not a federal question involved. In this view of the case, all that the Supreme Court of Iowa did, was to render a decision against the alleged right of the State in a matter entirely independent of any and all federal questions. The case at bar, under this assignment of error, in so far as the constitution, laws, rules, regulations, or authority of the United States are concerned, is exactly the same as it would be, were Iowa an independent nation.

The right of the state, in such case, is just as unrelated to any federal question as is its right to punish with respect to an assault and battery committed by one of its citizens, within its own borders, upon another of its citizens. It is a right that has never been delegated or surrendered to the Federal Government. If, therefore, the decision of the State Court is based upon an assumption that the Interior Department had a power which, in fact, it did not possess, such decision may be erroneous, but it does not come within the purview of Section 2 of the Judiciary Act of 1867.

II.

SECOND ASSIGNMENT OF ERROR.

The court erred in holding that the survey of the public lands of the United States, the approval of such survey by the Land

Commissioner of the United States and the Secretary of the Interior, and the sale of the land under such survey, did not fix the status of the meandered lakes and streams, except in cases of palpable mistake or fraud beyond recall by any subsequent act of the Land Department.

In passing upon this Assignment of Error there are two things which are important to be considered:

First. What was decided by the Supreme Court of Iowa?

Second. Just what is the federal question involved?

The Supreme Court of Iowa decided that where lands at one time belonged to the State of Iowa, either because they inured to it under the Swamp Land Act of 1850, or because they inured to it by virtue of its sovereignty, and where the Governor of the State had requested the Secretary of the Interior to patent such lands to the State as swamp lands, and the Secretary had patented the lands as such, and the State had in turn patented them to a third party, then, in such case, the last patentee is and should be deemed to be the owner of the lands so patented.

Now what is the federal question involved? The Governor of Iowa, as we have seen, had the right and authority and it was his duty, under the act of the Legislature of the State of Iowa, to ask the Secretary of the Interior to patent to the State of Iowa all lands which he deemed to be swamp and overflowed lands inuring to the State of Iowa under the act of 1850, and the Supreme Court of that State has, in the case at bar, decided that he had such right and power, and to reach such decision said Court did not pass upon any federal question.

The Governor of the State of Iowa, in asking the Secretary of the Interior to patent the land to the State, as truly and legitimately represented the State in so doing, as does the Attorney-General of the State in this proceeding. The Land Commissioner of the United States and the Secretary of the Interior are the officers, who, under the laws of the United States, are charged with the management of the public lands of the United States. It is they who pass upon the evidence presented as to the character of the lands; it is they who determine when patents shall issue; it is they who have control of the original government surveys of the public lands and who approve of such surveys; it is

they who by such surveys delimit the public domain, i. e., the lands of which the United States may dispose, and the lake beds and navigable streams of which the United States may not dispose. The power of the Secretary of the Interior under the law goes even further than above indicated. In the case of *Knight vs. The United States Land Association, 142 United States, 161*, it is laid down that the power to make and correct surveys of the public lands belongs exclusively to the political department of the government, and that the action of that department is unassailable in the courts, except by a direct proceeding. In said case it is also held that in matters relating to the sale and disposition of the public domain, the surveying of private land claims, and the issuing of patents thereon, and the administration of the trusts devolving on the government, by reason of the laws of Congress, or under treaty stipulations, respecting the public domain, the Secretary of the Interior is the supervising agent of the government, to do justice to all claimants and to preserve the rights of the people of the United States. In said case it likewise held that the Secretary of the Interior has ample power to set aside one public survey, although the same may have been approved by the surveyor-general of the state and confirmed by the Commissioner of the General Land Office, with no appeal taken, and to order a new survey; and that his action in that respect is unassailable in a collateral proceeding.

In the case of *Brown vs. Hitchcock, Secretary of the Interior, 173 U. S., 473*, it is stated that certain lands (List No. 5) were selected by the State of Oregon as swamp land. On September 16, 1882, the selection was approved by the Secretary of the Interior, Henry M. Teller. Years afterwards, and on the 27th day of December, 1888, the then Secretary of the Interior, William F. Vilas, made and entered an order annulling, canceling and revoking the said list and the determination made by his predecessor in office, the said Henry M. Teller, and he, the said Vilas, determined that the said lands belonged to the public domain of the United States, and this court sustained the action of Secretary Vilas in setting aside the finding of his predecessor and the selection and approval of such predecessor.

I do not deny but that, as a general proposition, surveys that have been made under the supervision of the Land Commissioner

of the United States and that have been approved by the Secretary of the Interior, fix the *status* of the land surveyed. But this is not the question in this case. The question to be considered here is this: Does the mere act of having once approved a survey always and forever end the jurisdiction of the Secretary of the Interior in the premises, or has he the power when the rights of third parties do not intervene, and when he is called upon to act by the only party to be affected—has he the power or authority under the laws of the United States to re-investigate the character of land once surveyed?

In patenting the said lands to the State of Iowa, the Secretary of the Interior purported to be acting under the laws and authority of the United States; he purported to be exercising the power and authority of the Secretary of the Interior as given to him by the laws of the United States. Had he such power and authority? I care not whether he exercised it rightly or wrongly, had he such power?

The plaintiff in error says that in such case he had no such power; the Supreme Court of Iowa says that in such case he had such power. Under this assignment of error, therefore, this is the sole question for determination. The decision of the Supreme Court of Iowa was not against, but in favor of, the authority exercised under the United States. This being so, this court has no jurisdiction to review it. In order to warrant a review, the decision of the court below must have been against the claim, power or authority exercised and not in its favor. On this point the authorities are uniform.

Jersey City, etc, Railroad Company vs. Morgan, 160 U. S., 288, 293.
Bartlett vs. Lockwood, 160 U. S., 357, 358.
Whitten vs. Tomlinson, 160 U. S., 231, 238.
Missouri vs. Audriano, 138 U. S., 496.
The Commonwealth Bank vs. Griffith, 14 Pet., 56, 58.
Fulton vs. McAffee, 16 Pet., 149.
Linton vs. Stanton, 12 How., 423.
Reddall vs. Bryan, 24 How., 420.
Ryan vs. Thomas, 4 Wallace, 603.

The federal question must have been decided in a certain way, that is against the authority exercised under the United

States. The question may have been erroneously decided; it may be quite apparent that a wrong decision has been rendered, but unless the decision is against the authority exercised, the court cannot entertain jurisdiction.

Murdock vs. Mayor, etc., of Memphis, 20 Wallace, 590.

Again, the federal question, if there is one in this case, was not necessary to a decision of the case by the Supreme Court of Iowa. In its opinion said court says: "The Attorney General "frankly concedes that the general government may have a re-"survey in case of fraud, palpable mistake, or for some other "causes, but he contends no such re-survey can be made after "the first survey has been approved and lots sold with reference "thereto. No doubt this is a general rule, *but who may complain "of the re-survey?* Surely not the State; or if the General Gov-"ment has power to order a re-survey because of a mistake, it "also has power to determine whether there has been a mistake. "Purchasers of lots abutting on the meandered line or otherwise "directly interested are, it seems to us, the only persons who "may object to the re-survey, and no re-survey will be permitted "which will in any manner prejudice their interests. They, as "we have seen, are not made parties to this suit and are making "no objection to plaintiff's title." Here we have an adjudication that the state cannot complain of a re-survey; that only the abutting property owners can do that, and they are not in court. If the State may not complain, it is by that fact alone out of court; that fact alone decides the case. What difference does it make whether the Secretary of the Interior exceeded his jurisdiction in making a re-examination of the land? If as to his act, the state was not in a position to complain, that fact alone was sufficient for the disposition of the case regardless of any federal question. The federal question, therefore, became or was unnecessary to the decision of the case, and this Court, therefore, has no jurisdiction in the premises.

This Court is not required to re-examine the judgment of the State Court simply because a federal question may have been decided. To give this Court jurisdiction, it must appear that such a question was necessarily involved in the decision:

Henry Moore vs. State of Mississippi, 21 Wallace, 636.

It the record shows upon its face that a federal question was not necessarily involved, this court will not go outside of it, to the opinion of the court below, or elsewhere, to ascertain whether one was in fact decided.

Henry Moore vs. State of Mississippi, 21 Wallace, 636.

In order to give this court jurisdiction of a writ of error to a state court it must appear affirmatively, not only that a federal question was presented for decision to the highest court of the state having jurisdiction, but that the decision of the federal question was necessary to the determination of the case, and that it was actually decided, or that the judgment, as rendered, could not have been given without deciding it.

DeSassure vs. Gallard, 127 United States, 216.
Johnson vs. Risk, 107 United States, 300.
New Orleans vs. New Orleans Water Works Company, 142 U. S., 79.

In the case of Murdock vs. Mayor, etc., of Memphis, 20 Wallace, 590, the court uses this language: "But in the other "cases supposed, why should a judgment be reversed for an error "in deciding a federal question, if the same judgment must be "rendered on the other points in the case? And why should "this court reverse a judgment which is right on the whole record "presented to us, or where the same judgment will be rendered "by the court below after they have corrected the error in the "federal question?"

"We have already laid down the rule that we are not auth- "orized to examine these other questions for the purpose of de- "ciding whether the state court ruled correctly on them or not. "We are of opinion that on these subjects not embraced in the "class of questions stated in the statute, we must receive the "decision of the State Courts as conclusive."

III.

THIRD ASSIGNMENT OF ERROR.

The court erred in not holding that the Land Commissioner of the United States Government had no authority by act of Congress or under the Constitution to patent to the State of Iowa any lake beds which had been meandered and were already the property of the State.

Had the Supreme Court of Iowa found against the defendants in error and held their patent void they might, in this court, contend that the court below erred in holding that the Land Commissioner of the United States had no authority to issue the patent; but it is a new doctrine that one may assign error based on a finding of the court below in favor of the authority alleged to have been exercised.

The supervising care of this court is not exercised for the purpose of restraining the State Court from holding in favor of the enlargement of powers claimed to be exercised under the United States. It is exercised for the purpose of preventing the State Court from crippling, hedging in and limiting the exercise of the power and authority of the United States.

When the decision of the State Court is in favor of the right, privilege, or authority claimed to have been exercised under the United States, this court has no jurisdiction to review it.

Jersey City Railroad Company vs. Morgan, 160 U. S., 288.

Bartlett vs. Lockwood, 160 U. S., 357.

IV.

FOURTH ASSIGNMENT OF ERROR.

The court erred in holding that the Land Commissioner of the United States had authority to take jurisdiction of the lake beds and to re-investigate the question after the lapse of forty-four years, and to issue a patent therefor, notwithstanding the alleged request of the Governor so to do.

What has been said under the second and third assignments of error will apply to this assignment and need not be repeated.

V.

FIFTH ASSIGNMENT OF ERROR.

The court erred in holding that the patent issued for unsurveyed lake beds in the State of Iowa could not be attacked or investigated by the courts; that the issuance of said patent was a finality, binding and conclusive upon the parties, especially the State of Iowa.

In this assignment of error there is the same vice as in the ones preceding. The Supreme Court of Iowa has not held what the said assignment of error would indicate that it has held, but for the sake of the argument, suppose that it has so held; thereby it has simply given greater force and efficacy to a patent issued by the United States than the plaintiff in error thinks should have been given to the patent; it has given greater force and efficacy, perhaps, than the federal courts would, themselves, give; but it has not found against the authority claimed to have been exercised under the United States; it has simply done the reverse.

The decision which the plaintiff in error claims the Supreme Court of Iowa has made, simply established for the State of Iowa a rule of property, which rule of property may be stated thus: Whenever a patent has been issued by the United States for unsurveyed lake beds situated in Iowa, that patent shall be the exclusive evidence of title to the property which it purports to convey. Such rule of property might not be the best rule that could be adopted; it might not in all cases be a just rule, but would that fact give this court jurisdiction to exercise a supervisory control over the Supreme Court of Iowa and dictate to it what the rules of property shall be in the State of Iowa?

In the case of *Lowndes vs. Huntington, 153 U. S., 19,* this court uses this language:

"With respect to the matter of title, there are involved not "mere y the construction of public grants and charters, but also "the extent and purposes to and for which the title and control of "submerged land may be passed away from the state to towns "and individuals. The question is of the rights attaching to cer- "tain lands within the territorial limits of the State, and whatever "becomes a settled rule of real property by the decision of its "courts is conclusive on this court. *Bondurant vs. Watson,* "*103 United States, 281, 289; Burgess vs. Seligman, 107 United* "*States, 20, 33; Gage vs. Pumpelly, 115 United States, 454;* "*Hardin vs. Jordan, 140 United States, 371, 382, 402; Shively* "*vs. Bowlby, 152 United States, 1.*"

In the case of *Kaukauna Water Power Company vs. Green Bay and Mississippi Canal Company, 142 United States, 271,* this

court uses the following language: "It is the settled law of "Wisconsin, announced in repeated decisions of its Supreme "Court: that the ownership of riparian proprietors extends to the "center of thread of the stream, subject, if such stream be navig- "able, to the right of the public to its use as a public highway for "the passage of vessels, * * * * * * With respect to "such rights we have held that the law of the state as declared "by its Supreme Court, is controlling as a rule of property." *"Barnes vs. Keokuk, 94 United States, 324; Packer vs. Burgess, 137 United States, 661; Hardin vs. Jordan, 140 United States, 371."*

"Where a course of decisions, whether founded upon statutes "or not, have become rules of property as laid down by the high- "est courts of the state, by which is meant the rules governing "the descent, transfer or sale of property and the rules which af- "fect the title and possession thereof, they are to be treated by the "Federal Courts as the laws of that state."

"Bucher vs. Cheshire R. R. Co. 125 U. S., 555."

"The courts of the United States will adopt and follow the "decisions of the highest court of the State, whether founded on "statutes or not, when the same have become rules of property "within the State. *Gormley vs. Clarke, 134 U. S., 348."*

VI.

SIXTH ASSIGNMENT OF ERROR.

The court erred in holding that the Constitution of the United States and the acts of Congress prohibited the State of Iowa from questioning the legality of the acts of the Land Commissioner in taking cognizance of the lake in question, which had been segregated as a lake from the public lands of the United States in 1851, and issuing a patent therefor under the swamp land act, and that the State was bound by the acts of the Land Commissioner in executing such patent.

The counsel for plaintiff in error seems by said assignment of error, to be under the impression that where the decision of the State Court is *in favor* of the validity of the authority exercised under the United States, it may be assailable in this court. The whole contention of the plaintiff in error is that the highest judicial tribunal of the State of Iowa had not sufficient regard

for the sovereignty of its own state, that it had not sufficient regard for the rights which properly belong to it, and that it gave to the Constitution of the United States and to the acts of Congress, and to the acts of the Land Commissioner of the United States and the Secretary of the Interior a latitude and potency which they do not possess. This court has been frequently called upon to set aside the decisions of the highest courts of the states, because they intrenched upon and limited the scope of the Constitution of the United States and the acts of Congress, or the powers exercised by the Land Commissioner of the General Land Office or those of other officers of the government, but it has, I think, rarely been called upon to set aside the decisions of the highest court of a state, because that court did not have a sufficiently exalted idea of the sovereignty of its own state, and had too exalted an idea of the powers of the Federal Government. This is not a case where the State of Iowa claims a right under a patent of the United States, which the Supreme Court of the State ignores; it is not even a case where the citizens of the State claim a right under the State, which the State court ignores; it is a case where the State says that its own Supreme Court will not clothe it with the title to land which it has, itself, conveyed away. Suppose this court should reverse the case and remand it, and that the Supreme Court of Iowa should say, "We care not whether the Secretary of the Interior had or had "not the power to issue a patent, we say, as we have already in "substance said before, the State of Iowa, under the circumstan-"ces of this case, is in no position to complain; only the abut-"ting property owners can do that." Would not the ultimate decision of the case stand just the same as if no writ of error had been taken to this court?

As the 7th assignment of error is practically the same as the 5th assignment, I shall not further notice it.

I respectfully ask this court to dismiss the case for the reasons above urged.

R. M. WRIGHT,
Counsel for Defendants in Error.

No. 9.

Brief of Wright for D. E.
Filed Apl. 7. 1902.

FILED
APR 7 1902
JAMES H. McKENNEY,
Clerk.

IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1901.

Term Number 9

THE STATE OF IOWA, PLAINTIFF IN ERROR,

vs.

EDWIN O. ROOD, CHARLES W. ROOD, GEORGE A. WALLACE, EMILY J. WALLACE, GEORGE S. WALLACE, AND MRS. GEORGE S. WALLACE,

DEFENDANTS IN ERROR.

IN ERROR TO THE SUPREME COURT OF IOWA.

BRIEF AND ARGUMENT FOR DEFENDANTS IN ERROR.

R. M. WRIGHT, ATTORNEY FOR DEFENDANTS IN ERROR.

(17738)

IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1901.

Term Number 52.

THE STATE OF IOWA, PLAINTIFF IN ERROR,

vs.

EDWIN O. ROOD, CHARLES W. ROOD, GEORGE A. WALLACE, EMILY J. WALLACE, GEORGE S. WALLACE, AND MRS. GEORGE S. WALLACE,

DEFENDANTS IN ERROR.

IN ERROR TO THE SUPREME COURT OF IOWA.

BRIEF AND ARGUMENT FOR DEFENDANTS IN ERROR.

ADDITIONAL STATEMENT OF THE CASE.

In the year 1879, the County of Humboldt, Iowa, in consideration of the building of the Fort Dodge and Fort Ridgely Railway through the county, made a contract with said railroad company (trans., 5–8) whereby it agreed to convey all its swamp lands to said railroad company, both those that were then patented to the county and those which should thereafter be patented to it. This contract was ratified by the voters of the county in the manner provided by law and the railroad was built pursuant to its terms and conditions.

In the year 1884 the county, in pursuance of said contract, in terms conveyed to said railroad company as swamp land (trans.

81) the unsurveyed portions of sections 21, 22, 27 and 28, of township ninety-two (92) north, of range twenty-seven (27) west, of the 5th P. M., Iowa, being the land in controversy. On December 15, 1884, the said railroad company (trans. 83) deeded the said lands to one A. McBane, who shortly thereafter deeded them to George R. Pearsons, the grantor of the other co-defendants in error in this case. Immediately on these lands being deeded by the railroad company George R. Pearsons, supposing himself to be the owner thereof and regarding the same as swamp lands, commenced to ditch and drain the same, and continued so to do up till the year 1892 (trans. 30) and he spent in this work the sum of $2,860.00.

In the year 1895 he requested the governor of the state of Iowa to procure a patent from the government of the United States to the state of Iowa of said lands as swamp lands, and he submitted to the governor his proofs. *Section 2 of the Swamp Land Act of September 28, 1850* (United States Statutes at large 9 vol. 520) provides "that it shall be the duty of the Secretary "of the Interior so soon as it may be practicable after the passage "of this act to make out accurate lists and plats of the said lands "described as aforesaid, and transmit the same to the governor of "the state * * * * and at the request of the said governor "cause patents to be issued to the state therefor, and on that pat-"ent the fee simple to said lands shall vest in the state subject to "the disposition of the legislature thereof." *Section 3 of Chapter 138 of the laws of the Fifth General Assembly of Iowa*, passed January 25, 1855, provides as follows: "That the governor is "hereby authorized to adopt such means as to him may seem ex-"pedient to provide for the selection of the swamp lands of this "state and to secure to the state the title to the same."

Under this provision of law, the governor submitted to the secretary of the interior the proofs furnished him and requested a patent, which was accordingly issued to the state and thereafter the said lands were patented by the state as swamp lands to the county of Humboldt.

QUESTIONS IN THE CASE.

In this case there are two general questions to be considered:

First. Has this court jurisdiction to hear and determine the case?

Second. If it has jurisdiction, what ought its decision to be?

The first of the above questions has been argued on the motion to dismiss the writ of error and will be noticed again only by way of argument in reply to plaintiff in error. The second question goes to the merits and will be argued at some length.

ARGUMENT AS TO THE JURISDICTION OF THIS COURT.

The jurisdiction of this court to consider this case involves the following questions:

First. Is there a federal question involved, and (1) has the decision of the federal question, if one is involved, been against the validity of a treaty or statute of, or an authority exercised under, the United States; or (2) has the decision been in favor of the validity of a statute of, or an authority exercised under, the state of Iowa, which statute or authority is repugnant to the constitution, treaties, or laws of the United States; or (3) has the decision been against any title, right, privilege or immunity specially set up or claimed by plaintiff in error under the constitution, or any treaty or statute of, or commission held or authority exercised under, the United States? If the answer to these questions is in the negative, it ends the case.

Second. Could the case have been decided by the supreme court of Iowa without regard to the federal question? If the answer to this question is in the affirmaative, it likewise ends the case.

I.

Article 3 of the Treaty with France, whereby the territory now embraced in the state of Iowa, was ceded to the United States, provides, "That the inhabitants of the ceded territory shall

"be incorporated into the Union of the United States, and ad-"mitted as soon as possible, according to the principles of the "federal constitution, to the enjoyment of all the rights, advant-"ages and immunities of the United States." This treaty did not, and does not, give to the state of Iowa the right to the lake beds and river bottoms located within its territory. Whatever rights it has to them are given by virtue of its statehood—existing just as they would exist if Iowa had been first organized as an independent nation and afterwards admitted into the Union. On coming into the Union, in so far as its rights to the beds of lakes and rivers were concerned, Iowa at once took on the *status* of the thirteen original colonies as that *status* existed prior to the adoption of the constitution and prior to the formation of the Union. It took the *status* which the British Province of Ontario would take if it now voluntarily came into the Union as a state. If the state of Massachusetts had within its borders any unoccupied lands and it were to transfer them to the United States to be treated as a part of the public domain, and the general government were to order a new survey, and in such survey there should be included some ponds that had theretofore been meandered, and the general government should attempt to sell them to private parties, and the supreme court of Massachusetts, on a claim to them being made by the state, should decide against the state, could it be said that there was a federal question involved which had been decided against the validity of a treaty or statute of, or against an authority exercised under, the United States, or against any title, right, privileges or immunity specially set up or claimed by the state under the constitution or any treaty or statute of, or commission held or authority exercised under, the United States? On the contrary, the right and title claimed would be entirely independent of the constitution or of any treaty or statute of, or commission held or authority exercised under, the United States, and the decision complained of, instead of being against, would be in favor of the validity of the authority exercised under the United States.

Our contention is, that in this case the state of Iowa is in exactly the same situation as the state of Massachusetts would be in in the case supposed.

The first of the foregoing questions relating to the jurisdiction of this court really contains three questions which I have numbered (1), (2), and (3), respectively. I shall take these up in their order.

Question (1) Has the decision of the federal question, if one is involved, been against the validity of a treaty or statute of, or authority exercised under, the United States? Under this division (1) of section 709 of the Revised Statutes, if a federal question is involved in the case at bar, it has not been decided against the plaintiff in error.

First as to the treaty and statute under which plaintiff in error claims ownership of the land in question and against which it claims the decision of the court below was directed.

(a) The treaty through which the plaintiff in error claims the ownership of the lake bed in question, is that of April 30, 1803, between France and the United States, and the statute under which its alleged right is claimed, is the statute admitting Iowa into the Union as a state. Now, we do not question the validity of this treaty nor the validity of this statute; we simply deny one of the consequences which it is claimed flow from them, *i. e.*, the right of the plaintiff in error to the land in question. This division which I have marked (1) of section 709 of the Revised Statutes is to be carefully distinguished from the division which I have marked (3), and which in this argument I shall take up later. Under this division (1) the decision of a lower court of which this court will take jurisdiction, must have been against the validity of the treaty, statute or authority exercised. Under the division which I have marked (3) the decision must have been against the right, title, privilege or immunity claimed to depend upon the treaty, statute or authority exercised. This court has said: "The distinction is palpable between the de-

"nial of the validity of the authority and a denial of the title, "right, privilege or immunity claimed under it."

Baltimore & Potomac Railroad Company, 130 U. S. 223.

"Whenever the power to enact a statute as it is by its terms, "or is made to read by construction, is fairly open to denial and "denied, the validity of such statute is drawn in question, but "not otherwise."

Baltimore & Potomac Railroad Company, 130 U. S. 224.

"The validity of the authority must have been drawn in "question directly and not incidentally. The validity of a statute "is not drawn in question every time rights claimed under such "statute are controverted, nor is the validity of an authority "every time an act done by such authority is disputed. The "validity of a statute or the validity of an authority is drawn in "question when the existence or constitutionality or legality of "such statute or authority is denied, and the denial forms the "subject of inquiry."

United States vs. Lynch, 137 U. S., 285.

"The validity of a statute is not drawn in question every "time rights claimed under such statute are controverted, nor is "the validity of an authority every time an act done by such "authority is disputed."

Cook County vs. Calumet & Chicago Land Company, 138 U. S., 653.

Under the above decisions it would seem clear that this case has nothing to do with the validity of any treaty or statute of the United States.

(b) *Second as to the validity of the authority exercised under the United States, under the exercise of which authority plaintiff in error claims ownership of the land.*

If under the division I have marked (1) of the judiciary act, the decision of the state court has given jurisdiction to this court, it is because said decision has been inimical to the validity *of an authority* exercised under the United States.

The second assignment of error reads thus: *The court erred in holding that the survey of the public lands of the United States, the approval of such survey by the Land Commissioner of the United States and the Secretary of the Interior, and the sale of the land under such survey did not fix the status of the meandered lakes and streams, except in cases of palpable mistake or fraud, beyond recall by any subsequent act of the land department.*

Under this assignment of error it is claimed that the original survey of the public lands, the approval of such survey, the sale under such survey of the lands surrounding the lake, were all done under the authority of the United States, and that the decision of the state court was against the validity of such authority. We admit that these acts were done under the authority of the United States, but we deny that the decision of the state court was against *the validity of the authority* under which they were done.

In *Millinger vs. Hortupee, 6 Wallace, 258, 261 and 262*, it is held that the word "authority" stands upon the same footing with "treaty" or "statute." What has been said, therefore, with respect to the validity of treaties and statutes will apply to the validity of "authority." The defendants in error admit the authority under which the United States surveyed the public lands surrounding this lake; they admit the right of the land commissioner and the secretary of the interior to approve the survey, though in this case no formal approval was ever made. They admit the right of the United States to make sale of the lands surrounding the lake in question; they admit the validity of the authority under which all these acts were done, but they aver that under this *valid* authority an erroneous survey was made with respect to the lands in question just as they might admit that a court having jurisdiction and full power and valid authority might make an erroneous decision; but they claim that in this case the erroneous decision made under valid authority has been set aside by competent authority.

Question (2) Has the decision been in favor of the validity

of a statute of, or an authority exercised under, the state of Iowa, which statute or authority is repugnant to the constitution, treaties or laws of the United States? This is not claimed by plaintiff in error and nothing, therefore, need be said in respect to it.

Question (3) Has the decision been against any title, right, privilege or immunity specially set up or claimed by plaintiff in error under the constitution, or any treaty or statute of, or commission held or authority exercised under, the United States? Under this division we say that no federal question whatever is involved.

The claim of title made by plaintiff in error in the second paragraph of its petition of intervention (trans. 10) reads as follows: "That the state of Iowa was duly admitted into the Union "and became a sovereign state in the year 1846, *and, as such sov-* "*ereign state, became and was the owner* of all the lakes within its "borders, subject to the right of the public to use the same and "for the use of the public, *and the title to the soil under said lake* "was and is in the said state." That this kind of ownership is the kind claimed by plaintiff in error is shown by the first assignment of error (trans. 93) wherein it is said "the court erred "in not holding that the lake beds of all meandered lakes and "streams in the state of Iowa belongs to said state in trust for "the public *by virtue of its sovereignty* and that the right *does not* "*depend upon any act of* congress or grant *from the United States*"

Obviously, under such a claim of title it would make no difference whether the territory of Iowa had come to the United States by treaty, by right of discovery, by conquest, or by simple occupation, the territory being vacant when first occupied, the title of the state when it became a state would be not by *virtue* of the manner in which the territory was acquired, but *by virtue of its sovereignty.* Error is predicated by plaintiff in error on the fact that the court did not hold that the claimed title of plaintiff did not arise from, or was not dependent on, any statute or act of congress. If it did depend on any act of congress it

must have been the act of congress that admitted Iowa into the Union.

In the case of *Pollard et. al., Lessee, vs. Hagen et. al., 3 Howard, 210*, it was contended that by the laws and usages of Spain the king had the right to grant the soil under the navigable waters to a subject, and that such lands were granted to the United States by the treaty with Spain, and the United States became the municipal owner of such lands and could in turn grant the same away to private parties. But in said case this court used this language: "Although there was no direct refer-"ence to any particular treaty, we presume the treaty of the 22d "of February, 1819, signed at Washington, was the one relied on "and shall so consider the argument. It was insisted that the "United States had, under the treaty, succeeded to all the rights "and powers of the king of Spain; and as by the laws and usages "of Spain the king had the right to grant to a subject the soil "under navigable waters, that, therefore, the United States had "the right to grant the land in controversy and thereby the "plaintiffs acquired the complete title.

"If it were true that the United States acquired the whole "of Alabama from Spain, no such consequences would result as "those contended for. It cannot be admitted that the king of "Spain could, by treaty or otherwise, impart to the United States "any of his royal prerogatives, and *much less can it be admitted* "that they have the capacity to receive, or *power to exercise, them.* "Every nation acquiring *territory by treaty or otherwise must hold* "*it subject to the constitution and laws of its own government, and* "*not according to the government ceding it.* (*Vat.* Law of Nations, "bk. 1, ch. 19. sec. 210, 244, 245, and bk. 2, ch. 7, sec. 80.)" The United States having received no such municipal ownership, could confer none.

The title claimed does not come from the constitution of the United States, for as is aptly said in the said case of *Pollard et. al., Lessee, vs. Hagen et. al., 3 Howard, 212,* "If an express "stipulation had been inserted in the agreement granting munici-

"pal right or sovereignty and eminent domain to the United "States, such stipulation would have been void and inoperative, "because the United States have no *constitutional capacity* to ex- "ercise municipal jurisdiction, sovereignty or eminent domain "within the limits of a state or elsewhere, except in cases in "which it is expressly granted."

The claimed title did not come from the treaty with France, for the title would be the same if there had been no treaty, but the territory of Iowa, being vacant, had simply been taken possession of and occupied by the United States.

The title does not come from any commission held or authority exercised under the United States, for such authority or commission could not confer title, and to say that it came from them would be to deny the claim of plaintiff in error that the lands belonged to the state by virtue of its sovereignty. The claimed title arose, not from any of these sources, but from the state's own sovereignty just as the ownership of the large ponds in Massachusetts came, not from an act of congress or from the United States, but from the state's inherent sovereignty. Under this division (3) of the judiciary act there clearly in this case was no federal question whatever to be decided in favor of or against the plaintiff in error.

II.

Could the case have been decided by the supreme court of Iowa without regard to the federal question?

In the case of *Hardin vs. Jordan, 140 U. S., 371*, this court did not hold that the ownership of meandered, non-navigable lakes was in the state in which they were situated; it simply held that the law of the state where they were situated as declared by its supreme court was controlling. That the states do not necessarily own the beds of meandered non-navigable lakes abundantly appears from the decisions. The supreme courts of Minnesota and Michigan and perhaps of other states, have declared that such ownership is in the riparian owners and the ownership of each of such owners extends to the middle of the lake.

Butler vs. Ry. Company, 85 Mich., 246; Lamprey vs. Metcalf et. al., 52 Minn., 181.

The supreme court of Iowa has never decided, so far as I can find, that the title to the bed of a non-navigable lake is in the state. The case of *Brown vs. Cunningham, 87 Iowa, 572,* was brought to recover on an injunction bond; the defendant was the riparian owner of land bounded by the meander lines of the Wapsepinecon river, a non-navigable stream. The plaintiff was cutting and removing ice from the river adjacent to the defendant's land, and the defendant procured an injunction to issue, restraining the plaintiff from removing ice, claiming that he was the owner of the river to the center of the stream; the plaintiff claimed that the defendant's title extended only to high-water line and brought suit on the bond for damages. The supreme court of Iowa said, "The river while not navigable was meander-"ed in the government survey. The bed of the stream—the "land—*never passed out of the proprietorship of the United States "government,* and the riparian owners had no right or interest "therein, and had no exclusive rights to the ice found upon the "stream." The joint resolution which is numbered 4 and is contained on page 213 of the laws of the Eighteenth General Assembly of Iowa, is in these words: "Be it resolved by the Gen-"eral Assembly of the state of Iowa, that our senators in con-"gress be instructed, and our representatives be requested, to "use their best endeavors to secure the relinquishment by the "United States to the state of Iowa of the title to all meandered "lakes within the limits of the state, the state to take care that "such lakes be preserved and in no event to part with the title "thereto." "*Approved February 27, 1880.*"

The state of Iowa originally conveyed its swamp lands to the counties for certain specific purposes—certain improvements that they were to make. These anticipated improvements were the consideration for the conveyance of the swamp lands by the state to the counties. Humboldt county to obtain an improvement, *i. e.*, the construe-

tion of the Fort Dodge & Fort Ridgely Railroad, made a contract with said company, agreeing to convey to it, not only all the swamp lands that had been patented to the county, but also all swamp lands that might thereafter be patented to it. Humboldt county and the railway company believed that the lands in controversy in this suit were swamp lands and that Humboldt county owned the same. On the strength of this contract and the belief that the railroad company would get the land in question, the improvement was made; the state got the same consideration for the lands in controversy that it would have received had the lands been actually swamp lands. Believing that they were swamp lands the defendants in error expended thousands of dollars in draining and improving the same. They thereafter made application to the governor to ask for a patent of these lands from the United States to the state as swamp lands. On this application being made it was open to the governor to say, "The "laws clothe me with the power to select swamp lands and to "secure patents to the same, but this land is not swamp land; I "have no power or authority in the premises, and I will not furn-"ish evidence to the land department tending to show that the "land is swamp land and will not request a patent." The governor did not do this. Like the legislature of Iowa, when passing the joint resolution, and like the supreme court of Iowa, as shown in the case of *Brown vs. Cunningham*, he did not regard the land as belonging to the state by reason of its sovereignty. When the application for a patent was made there was no one who appears to have entertained any idea that the land belonged to the state by reason of its sovereignty. The supreme court of the state, as shown by its decision, did not; the legislature of the state, as shown by its resolution, did not; the governor of the state, as shown by his act in asking for a patent, did not; and the county of Humboldt and the defendants in error did not. Is it now open to the state after encouraging the defendants in error to go on and expend their money and complete their title now to claim under a title which by its prior conduct it seems never to have recognized, or will it be estopped?

In the 4th defense of the defendants in error to the petition of intervention they pleaded estoppel against the state (trans. 13;) that this can be pleaded against the state would seem to be shown by the following authorities:

When a state comes into a court of equity to assert a claim, it is subject, and must be subject, to the same rules of procedure and principles of jurisprudence as obtain in suits between private individuals. *United States vs. Arredondo, 6 Peters, 691; United States vs. Flint, 4 Sawy., 68; United States vs. Tichenor, 12 Fed. Rep, 449.*

The case of *Chope vs. Detroit Road, 37 Mich., 195,* was a case where the state had given the right to the defendant to erect toll gates outside the city of Detroit. After the growth of the city so as to include these toll gates within its limits, it was sought by the state to enjoin the defendant from continuing a nuisance, and it was held that the state was estopped so to do.

"Where it is the duty of certain designated officers of the "state to make selections of land under the federal law, the state "is estopped by the action of such officers, in the absence of "fraud or collusion. The acts of the officers acting on behalf of "the state within the limits of the authority conferred upon "them and in the performance of their duties, are the acts of the "state and cannot be repudiated by it." *Herman on Estoppel, Vol. 2, §1228; also see on the same subject, Vol. 2, §76.*

The question of whether an estoppel is available against the state arose in *Commonwealth vs. Andre, 3 Pickering, 224.* It appeared that a committee of the legislature, duly authorized, granted by deed to Pierre Mathieu and his heirs and assigns, with warranty, a certain tract of land. Andre at the time was an alien subject of France. The purchase was made for the benefit of one Billon, also a subject of France. Upon the death of these persons intestate, the attorney general, pursuant to an act of the legislature, filed an information to recover the land, alleging that it ought to escheat to the commonwealth for defect

of title in any person who could, by law, hold it; but the court held the commonwealth estopped by its deed. *Bigelow on Estoppel, 246.*

"The deed of the commonwealth," said Chief Justice Parker, "to the very persons now defending as heirs of Andre, to "whom and to whose heirs the grant was made, is, we think, an "estoppel against setting up the alienage of these persons as a "ground of recovery." *Commonwealth vs. Andre, 3 Pick., 224.*

"No case has been cited from the supreme court in which "it has been directly held that the defense of estoppel can be "made against the national government, but in many cases it is "so assumed even where the term is not used." *United States vs. Williamette V. & C. M. R. Co., 44 Fed. Rep., 241.*

In the case of *Clarke vs. United States, 95 U. S., 543*, it was held that the defense to a claim against the government for the use of a steamboat, which involved bad faith on its part, could not be made. In *Branson vs. Worth, 17 Wall., 39*, it is assumed, in the opinion of the court, that the United States may be estopped. In the *United States vs. McLaughlin, 12 Sawyer, 200—30 Fed. Rep., 147*, it was said by Judge Sawyer, "that the law of estoppel, in a proper case, applies to the government." In *Indiana vs. Milk, 11 Fed. Rep., 389*, the court having found that the state, by its conduct, had recognized the validity of defendants' title, and thereby induced them to alter their position by investing their money in that title, Judge Gresham said: "The "state cannot now in fairness of law assert its invalidity. Reso-"lute good faith should characterize the conduct of states in their "dealings with individuals, and there is no reason in morals or in "law that will exempt them from the doctrine of estoppel."

Where the legislature, by a public resolve had declared that a certain monument was and was considered as the monument mentioned and intended in an ancient Indian deed under which a title was derived to certain proprietors, the commonwealth was estopped from afterwards showing that such monument was not

the one intended in such deed. *Commonwealth vs. Pipsent Proprietors, 10 Mass., 154.*

It is well settled that when the United States becomes a party to a suit in the courts, and voluntarily submits its rights to judicial determination, it is bound by the same principles that govern individuals. When the United States voluntarily appears in a court of justice, it at the same time voluntarily submits to the law, and places itself upon an equality with other litigants. *United States vs. Fossatt, 21 How., 450; The Floyd Acceptance, 7 Wall., 675; United States vs. Baker, 12 Wheat,, 559.*

The principles which govern inquiries as to the conduct of individuals in respect to their contracts are equally applicable where the United States are a party. *United States vs. Smith, 94 U. S., 217.*

In the case of *The Siren, 7 Wall., 159*, the court said:

"But, although direct suits cannot be maintained against the "United States, nor against their property, yet, when the United "States institute a suit, they waive their exemption so far as "to allow a presentation by the defendant of set-offs, legal and "equitable, to the extent of the demand made or property claim-"ed, and when they proceed *in rem*, they open to consideration all "claims and equities in regard to the property libeled."

And in the same case it was said that the government, by its appearance in court, "waives its exemptions and submits to "the application of the same principles by which justice is "administered between private suitors."

See, als , *Burbank vs. Fay, 65 N. Y., 62; Osborne vs. Bank of U. S, 9 Wheat., 870; U. S. vs. Macdaniel, 7 Pet., 1; Brent vs. Bank of Washington, 10 Pet., 615.* In the latter case the court declares that there is no reason why the United States should be exempted from a fundamental rule of equity subject to which its courts administer their remedy, and it is said: Thus compelled to come into equity for a remedy to enforce a legal right, the United States must come as other suitors, seeking, in the administration of the law of equity, relief, etc.

It follows, then, that when a state submits itself without reservation to the jurisdiction of a court in a particular case, that jurisdiction may be used to give full effect to what the state has by its acts of submission allowed to be done.

Admitting, then, that Owl Lake became the property of the state by reason of its sovereignty, was it not competent for the supreme court of Iowa, under the circumstances of this case, to say, as it did say, that it was not for the state to complain of the resurvey, and could not the case have been decided by the supreme court of Iowa without regard to the federal question involved?

III.

ARGUMENT ON THE MERITS.

If there is a federal question involved in this case and the right claimed by plaintiff in error as having its source in this federal question has been decided against it and the supreme court could not have decided the case on any question other than the federal question, then to what extent will this court enter into the merits of the case under the decisions of this court and notably under the decision in the case of Murdock vs. Mayor, etc. of Memphis, 20 Wall., 590, 642-3.

This court will inquire into the jurisdiction of the secretary of the interior to issue the patent of the land as swamp land to the state of Iowa, and beyond that it will not go.

If it finds in favor of that jurisdiction, it will affirm the judgment and that will end the case. If it finds against the jurisdiction, it will not find, as is contended by the plaintiff in error, "that the state of Iowa is the absolute owner of the land in question;" it will simply hold in harmony with the case of *Hardin vs. Jordan, 140 U. S., 371*, that the land, being the bed of a meandered non-navigable lake, is to be disposed of under the law of the state of Iowa, and it will remand the case back to the supreme court of Iowa for such final disposition.

In this case the plaintiff in error is the one who is seeking

affirmative relief and its suit is an assault, in a collateral proceeding, upon a patent of the United States, and it cannot succeed in such suit unless the patent is absolutely void, by reason of the fact that the secretary of the interior had no power, jurisdiction or authority to issue the same.

A.

In discussing this case on the merits with respect to the assignments of error, it becomes important to know just what the supreme court of Iowa did and did not decide. It did not decide that the beds of meandered lakes and streams do not belong to the state in trust for the public by virtue of its sovereignty and apart from any act of congress or grant from the United States. In the last analysis the only things it did decide were these: *First*, that there are cases where the secretary of the interior has the jurisdiction to re-investigate an original survey, and that the case at bar was one of such cases; and, *second*, that when such re-investigation has been made, it cannot be questioned in a collateral proceeding.

The assignments of error, when closely considered, narrow themselves down to the question of the correctness of the two findings above mentioned. In making said findings, said court did not deny, but it affirmed, that the duty of surveying the public domain and determining what lands belong to the general government under its deeds of cession or treaties and what are its arable lands and what are its swamp lands and what are the lands and waters that the state holds under its right of sovereignty, is committed to the department of the interior for determination. It did not deny, but it affirmed, that the decision of the department of the interior upon matters of fact within its jurisdiction, in the absence of fraud or imposition, is conclusive and binding upon the courts of the country, and it did not deny that the secretary of the interior had no jurisdiction, *as against a patentee in good faith under one survey*, to again patent the same land to another patentee under a second survey. It did not deny that the secretary of the interior would have no jurisdiction

to patent what never belonged to the United States or to patent what did belong to the United States, if it had been reserved from sale. And it did not deny the binding force of the decisions, cited by plaintiff in error, which hold that there is no jurisdiction to issue patents in *such cases*, lodged with the secretary of the interior. Such cases, however, are not this case. When Iowa was admitted into the Union certain of its territory belonged to the United States as a part of the public domain, and certain of its territory belonged to it as an attribute of its sovereignty. It became the duty of the secretary of the interior to dirempt or separate these parts one from the other; it was not his duty to give anything to the state of Iowa that did not belong to it, nor to sell anything to it. By his act the state did not become a purchaser for value to whom, by reason of such purchase, there would attach certain rights. He simply separated what belonged to the United States from that which belonged to the state of Iowa. Surely, as between these two parties, no other rights having attached, he could re-investigate and correct an erroneous survey. This is what the supreme court of Iowa decided, and this is all that it did decide, saving and excepting the further finding, which is in harmony with all the authorities, that his decision, if he had jurisdiction, cannot be assailed collaterally.

B.

In the case of *Steel vs. St. Louis Smelting and Refining Company, 106 U. S., 447*, this court says: "That department "(the interior department), as we have repeatedly said, was es- "tablished to supervise the various proceedings whereby a con- "veyance of the title from the United States to portions of the "public domain is obtained, and to see that the requirements of "the different acts of congress are fully complied with. Neces- "sarily, therefore, it must consider and pass upon the qualifica- "tions of the applicant, the acts he has to perform to secure the "title, *the nature of the land, and whether it is of the class open to* "*sale*. Its judgment upon these matters is that of a special tri-

"bunal, and is unassailable, *except by direct proceedings for its "annulment or limitation.*"

But a patent may not be collaterally impeached and its operation and conveyance defeated, except by showing that the department had *no jurisdiction* to dispose of the lands, that is, that the law did not provide for selling them or that they had been reserved from sale or dedicated to special purposes.

Wright vs. Rosebury, 121 U. S., 488.

The act of the secretary of the interior in identifying such lands is conclusive against collateral attack.

Ditto.

In the case of *French vs. Fyan, 96 U. S., 169,* the land department, having decided that a certain tract of land was swamp land, this court treated it as the determination of a special tribunal, which was binding in all actions brought to annul the patent. The land officers are charged with the duty of ascertaining whether the lands are subject to be patented or not, and their determination is conclusive. The character of the land is a thing which requires the exercise of judicial power and discretion upon the part of the officers of the land department, and their judgment thereon is not in a collateral proceeding open to review, where they have jurisdiction to act.

French vs. Fyan, 93 U. S., 169; Vance vs. Burbank, 101 U. S., 514; Smelting Company vs. Kemp, 104 U. S., 636; Quinby vs. Conlan, 104 U. S., 420; Gale vs. Best, 78 Cal., 235.

The question whether or not lands returned subject to periodical overflow are swamp and overflowed lands, is a question of fact properly determinable by the land department whose decision on matters of fact within its jurisdiction are, in the absence of fraud or imposition, conclusive and binding on the courts and not subject to review.

Heath vs. Wallace, 138 U. S., 573.

The land department is a tribunal appointed by congress to

decide certain questions relative to the public lands, and its decision upon matters of fact cognizable by it, in the absence of fraud or imposition, are conclusive everywhere else.

Johnson vs. Towsley, 13 Wall., 72; Warren vs. Van Brunt, 19 Wall., 946; Shepley vs. Cowan, 91 U. S., 330.

In the case of *Johnson vs. Drew, 171 U. S., 93*, this language is used: "The law in reference to this matter was summed up in the case of *Burfenning vs. Railway Company, 163 U. S., 321 and 323*, as follows: 'It has undoubtedly been affirmed over and over again, that in the administration of the public land system of the United States, questions of fact are for the consideration and judgment of the land department, and that its judgment thereon is final whether for instance a certain tract is swamp land or not, saline land or not, mineral land or not, presents a question of fact not resting on record, dependent on oral testimony; and it cannot be doubted that the decision of the land department one way or the other in reference to these questions is conclusive and not open to relitigation in the courts, except in those cases of fraud, etc., which permit any determination to be re-examined.'"

C.

Nearly, if not, all the authorities cited by plaintiff in error on the question of the jurisdiction of the secretary of the interior simply hold that a patent may be assailed in a collateral proceeding when it covers land that has already been conveyed by a prior patent, or when the land has already been disposed of by act of congress, or where it has been reserved from sale. We freely admit that in such cases jurisdiction is wanting in the secretary of the interior and there can be no question but that a patent issued under such circumstances can be collaterally assailed.

This, however, is not a case where the secretary of the interior has conveyed to an individual a 'lake bed" as such; it is not a case where the government has attempted in terms to convey to an individual the "tide waters" of the state; it is not a

case where the government has conveyed by patent to an individual a tract of land which, in terms, it had theretofore conveyed to another.

In such cases as the ones just mentioned it may be conceded that the land department would be without jurisdiction and that the patent would be void and could, therefore, be assailed in a collateral proceeding. But the case at bar is a case where the secretary of the interior purports, in terms, to convey swamp lands to the state as such, and he has the right under the law to convey swamp lands; he is clothed with this power, and by statute it is made his duty.

In this case he determined that the original plat made by the United States surveyor was wrong and that the land beyond the meander lines was not lake bed but swamp land. In the absence of some equity claimed by a *bona fide* purchaser or some equity claimed by a riparian owner, he had jurisdiction to determine that the original survey and plat were wrong.

D.

When the treaty was made with France in 1803, whereby there was transferred to the United States the territory now contained within the limits of the state of Iowa, there were, as has been said, in said territory the beds of lakes and rivers, the title to which the United States, we may admit, received and held in trust for the future state and which, when the state came into existence, attached to it as an attribute of its sovereignty, and there were the lands which became the property of the United States as a part of the public domain.

On the making of the treaty these two classes of lands were not segregated one from the other. Iowa was admitted into the Union in 1846, yet even at that time the two classes of lands which were in the vicinity of Owl Lake were still unsegregated one from the other. The officers of said state did not then know what lands did or did not attach to it by virtue of its sovereignty. How was the matter to be determined? Where was the jurisdic-

tion to determine it? Was it in the new sovereignty, the state, or was it in the land department of the general government? The plaintiff in error admits that this jurisdiction was originally in the land department of the general government, for in argument it says in substance, that when the original United States survey was made, the meander lines run, the survey approved and the adjoining lands sold, the character of the lands in controversy as lake bed thereby became irrevocably fixed.

In this proposition is summed up the whole claim and case of plaintiff in error, and the whole question is aptly stated by the supreme court of Iowa, in this case,—*109 Iowa, 13*—as follows: "The whole case, in our judgment, turns upon the effect "to be given the original survey. If that is conclusive, it amounts "to a segragation of the lakes and river beds from the public do- "main, and, as a general rule, confirms the title thereto in the "state. If the survey is not conclusive, but is simply adminis- "trative or advisory, then the land department has the right at "some future day to determine its character and cause a patent to "issue accordingly, and when this is done the finding is not sub- "ject to collateral attack."

In the case of *Grant et al. vs. Hemphill et al., 92 Iowa, 218*, it was proved that the land in controversy in that case, which the government survey and plat showed was lake bed and which was beyond the meander lines, was in fact high, dry ground, and that there was no shore line at all, and the supreme court of Iowa found and held that the supposed lake bed was not lake bed at all, but a part of the public domain. In the case of *Bigelow vs. Hoover, 85 Iowa, 161*, the question arose as to the ownership of a certain island in a meandered lake. The island had become by accretion attached to the adjoining land. The original government survey showed no island, but it showed a place occupied by the island as a "bayou." If, as a matter of fact, no island existed at the time of the government survey, then the island was the property of the plaintiff in said action by the law of accretion. If at that time it did exist as an island, it was not the property

of the plaintiff. The supreme court of Iowa found in opposition to the government survey that the so-called lake was at the time of the government survey in part an island, and as such was the property of the general government and a part of the public domain.

In passing upon the question said court says, *85 Iowa, page 183*, "We conclude that notwithstanding what appears in the "government plat, the island did exist at the time of the survey "as a separate and distinct body of land from the plaintiff's lots, "and the plaintiff is not, therefore, entitled to the whole of the "island as accretion to his land."

In the case of *Glenn et al. vs. Jeffry, 75 Iowa, 20*, the government survey and plat showed that the meander lines were along the banks of the Missouri river and that whatever was beyond these lines was in the bed of the river. The supreme court of Iowa found contrary to the original government survey that the meander lines were along a bayou and that between this bayou and the river was an unsurveyed portion of the government domain.

Our contention in this case can be stated in two propositions:

First. Originally the land department of the United States had jurisdiction to segregate the public domain from the beds of lakes and streams, the title to which beds and streams attach to the state as an attribute of its sovereignty.

Second. The secretary of the interior has ample power to set aside a survey of public lands, though the same has been confirmed by the commissioner of the general land office, and though an appeal has not been taken from his findings; and the action of the secretary of the interior in this respect is unassailable in a collateral proceeding where rights of *bona fide* purchasers for value do not interfere. Under this contention, even though a survey has been made, the lines meandered, and the land beyond the meander lines has been on the pl t marked "lake," and even though the survey has been approved by the commissioner of the

general land office and no appeal has been taken from his finding, it is still competent for the secretary of the interior, the rights of *bona fide* purchasers for value not having intervened, to set aside such survey and to order a new survey and to determine that the land beyond the meander lines is not correctly described by the original survey and plat; and he can do this either on evidence furnished to him as was done in this case, or he can do it on his own motion or for any other reason which satisfies him that the first survey was incorrect; and he is clothed with this power under the law.

This whole question, it seems to me, has been settled by this court in the case of *Knight vs. United States Land Association, 142 U. S., 161.* In that case one Stratton had made a survey which was approved by the surveyor general of the state of California, and confirmed by the commissioner of the general land office. This survey, like the one in the case at bar, did not include the lands afterwards in controversy, said lands being beyond the meander lines, and claimed to be below high tide, and as such the property of the state, pertaining to its sovereignty as such. No appeal was taken from the action of the commissioner of the general land office approving the Stratton survey.

In making this survey Stratton ran its lines along the line of ordinary high-water mark of the bay of San Francisco until he came to Mission creek, a small stream or estuary of the bay, and then followed the tide line up the creek, and crossing over, ran down on the other side. This plan seems also to have been followed with reference to a few other small estuaries. The city protested against this method of survey, and, through her attorney of record, gave notice of appeal from the action of the commissioner of the general land office to the secretary of the interior, claiming that the proper method of running the line along the bay was to follow the tide line of the main body of water and cut across the mouths of all estuaries or creeks which are arms of the bay. The board of supervisors of the city, however, decided not to appeal from the decision of the commis-

sioner of the general land office confirming the Stratton survey, and, declaring that the action of the attorney was unauthorized, discharged him. Thereafter the board passed a resolution, addressed to the secretary of the interior, in which it was stated that, in its opinion, the Stratton survey was entirely correct and legal, and should be approved.

Notwithstanding this action of the board, the secretary of the interior sent for the papers in the case, and, upon an elaborate examination of the points involved, reversed the action of the commissioner of the general land office approving the survey, thus substantially sustaining the original protest of the city to the running of the boundary line of the grant up the estuaries of the bay.

Upon motion for review, a subsequent secretary of the interior sustained the action of his predecessor, and ordered a survey made in conformity with the views of the department. *2 Land Dec., 346.* It was under those instructions that the Von Leicht survey was made, upon which the patent was issued. Subsequently an application was made to a succeeding secretary to have the patent recalled and cancelled, and a new patent issued but it was denied, the secretary holding that he had no power under the law to grant the application, and that, even if he had, he should decline to exercise it, because he considered the views of his predecessors sound and correct. *5 Land Dec., 483.*

The plaintiff, the United States Land Association, claimed the land from the state of California and that the title of the state to the land attached to it as a part of its sovereignty. The defendant claimed the title to the land through a patent issued by the United States' land department, based on a survey known as the Von Leicht survey, made long after the original Stratton survey. After the parties had introduced their evidence of title, the referee to whom the case had been referred found as follows:

"(1) The state of California upon her admission into the "Union, September 9, 1850, became seized in fee of the premises ' in dispute;

"(2) This title subsequently became vested in the plaintiffs "by virtue of certain conveyances described;

"(3) This title of the plaintiffs was subject to defeat by the "decree of the circuit court confirming the claim of the pueblo, "but the premises being without the confirmed survey of 1873, "and outside the specific boundary given in the decree, remained "the property of the state;

"(4) The second (Von Leicht) survey was illegal because it "was not approved by the surveyor general of California, no ap- "peal was taken to the secretary of the interior from the decision "of the commissioner of the general land office approving the "prior survey; and because the second survey was not retained "in the office of the United States surveyor general for ninety "days, and no notice of the same was given to enable parties in "interest to file protests, as required by law; and because, in ap- "proving said prior survey, said commissioner of the general land "office was acting in a judicial capacity and his judgment there- "on is not reversible and was not legally reversed; and

"(5) The description of the premises contained in the pat- "ent being in excess of the premises described in the prior survey "and in the decree, the patent, to the extent that it covered land "of the state not confirmed to the claimant, was invalid and did "not operate to convey the state's title to the premises in contro- "versy."

The judgment of the supreme court of the state was based substantially on the same grounds as that of the referee. The correctness of the propositions of law involved were drawn in question by writ of error bringing the proceedings before this court. In passing upon the question, Justice Lamar uses the following language:

"The case as presented by this record involves some very "interesting questions. Ever since the decision of *Polk's Lessee "vs. Wendall, 9 Cranch, 87*, it has been the settled law of this "court that a patent is void at law if the grantor state had no "title to the premises embraced in it, or if the officer who issued

"the patent had no authority so to do, and that the want of such "title or authority can be shown in an action at law. *Patterson "vs. Winn, 11 Wheat., 380, 384; Stoddard vs. Chambers, 2 How., "284, 318; Easton vs. Salisbury, 21 How., 426; Reichart vs. "Felps, 6 Wall., 160; Best vs. Polk, 18 Wall., 112; Smelting Co. "vs. Kemp, 104 U. S., 636; Steel vs. Smelting Co., 106 U. S., "447, 453; Wright vs. Roseberry, 121 U. S., 488, 519; Doolan "vs. Carr, 125 U. S., 618, 625, and authorities there cited.*

"It is sought by the plaintiffs to bring this case within that "rule; and it is, therefore, strenuously insisted that the patent for "the San Francisco pueblo is void to the extent that it embraces "lands below ordinary high water mark of Mission Creek, as that "line existed at the date of the conquest from Mexico in 1846. "In order to sustain this proposition the claim is put forth that "the Stratton survey was correct, and was never legally set aside; "that the Von Leicht survey, upon which the patent was issued, "was wholly unauthorized in law and void; and that the prem- "ises in dispute being excluded by the Stratton survey, and being "proved by parol evidence to have been below the line of ordin- "ary high-water mark, were never legally included in the patent, "and were not included in the decree of confirmation.

"It is a well settled rule of law that the power to make and "correct surveys of the public lands belongs exclusively to the "political department of the government, and that the action of "that department, within the scope of its authority, is unassail- "able in the courts except by a direct proceeding. *Cragin vs. "Powell, 128 U. S., 691, 699, and cases cited.* Under this rule it "must be held that the action of the land department in determining "that the Von Leicht survey correctly delineated the boundaries "of the pueblo grant, as established by the confirmatory decree, "is binding in this court, *if the department had jurisdiction and "power to order that survey.* It is claimed, however, and the ref- "eree so determined, that no such power or authority existed in "the department, because it had been exhausted by the action of "the commissioner of the general land office in approving and

"confirming the Stratton survey in 1878. This contention is "based upon the proposition that the secretary of the interior had "no authority to set aside the order of the commissioner approv- "ing and confirming the Stratton survey, especially in view of "the fact that no appeal was taken from such order and the au- "thorities of the city acquiesced in that survey. This proposition "is unsound. If followed as a rule of law, the secretary of the "interior is shorn of that supervisory power over the public "lands which is vested in him by section 441 of the Revised "Statutes. That section provides as follows: 'The secretary of "the interior is charged with the supervision of public business "relating to the following subjects: * * * * * Second, "The public lands, including mines.' Section 453 provides: 'The "commissioner of the general land office shall perform, *under the* "*direction of the secretary of the interior*, all executive duties ap- "pertaining to the surveying and sale of the public lands of the "United States or in any wise respecting such public lands, and "also such as relate to private claims of land, and the issuing of "patents for all (*agents*) (grants) of land under the authority of "the government.' Sec. 2478 provides: 'The commissioner of "the general land office, *under the direction of the secretary of the* "*interior*, is authorized to enforce and carry into execution, by "appropriate regulations, every part of the provisions of this title "(the public lands) not otherwise specially provided for.'

"The phrase, 'under the direction of the secretary of the "interior,' as used in these sections of the statutes, is not mean- "ingless, but was intended as an expression in general terms of "the power of the secretary to supervise and control the extens- "ive operations of the land department of which he is the head. "It means that, in the important matters relating to the sale and "disposition of the public domain, the surveying of private land "claims and the issuing of patents thereon, and the *administra-* "*tion of the trusts devolving upon the government, by reason of the* "*laws of congress or under treaty stipulations, respecting the public* "*domain, the secretary of the interior is the supervising agent of*

"*the government* to do justice to all claimants and preserve the "rights of the people of the United States. As was said by the "secretary of the interior on the application for the recall and "cancellation of the patent in this pueblo case (*5 Land Dec., 494*): "'The statutes in placing the whole business of the department "under the supervision of the secretary, invest him with authority "to review, reverse, amend, annul or affirm all proceedings in the "department having for their ultimate object to secure the alien- "ation of any portion of the public lands, or the adjustment of "private claims to lands, with a just regard to the rights of the "public and of private parties. Such supervision may be exer- "cised by direct orders or by review on appeals. The mode in "which the supervision shall be exercised in the absence of stat- "utory direction may be prescribed by such rules and regulations "as the secretary may adopt. When proceedings affecting titles "to lands are before the department the power of supervision may "be exercised by the secretary, whether these proceedings are "called to his attention by formal notice or by appeal. It is "sufficient that they are brought to his notice. The rules pre- "scribed are designed to facilitate the department in the despatch "of business, not to defeat the supervision of the secretary. For "example, if, when a patent is about to issue the secretary should "discover a fatal defect in the proceedings, or that by reason of "some newly ascertained fact the patent, if issued, would have to "be annulled, and that it would be his duty to ask the attorney "general to institute proceedings for its annullment, it would "hardly be seriously contended that the secretary might not in- "terfere and prevent the execution of the patent. He could not "be obliged to sit quietly and allow a proceeding to be consum- "mated, which it would be immediately his duty to ask the "attorney general to take measures to annul. It would be a "sufficient answer against the exercise of his power that no appeal "had been taken to him, and therefore he was without authority "in the matter."

"There is authority in this court for this holding. *Magwire*

"*vs. Tyler, 1 Black, 195,* was a case involving the right of the "commissioner of the general land office, under the act of July 4, "1836, 5 Stat. 107, c. 352, reorganizing that bureau, and of the "secretary of the interior, under the act of March 3, 1849, Stat. "395, establishing that department, to take jurisdiction of sur- "veys made in the upper Louisiana country upon confirmed "Spanish titles. One of the questions presented was whether the "secretary of the interior could reject such a survey and order a "new one of the same claim, and issue a patent upon the second "survey. By the act of March 3, 1807, the board of commis- "sioners appointed to pass upon the merits of such claims was re- "quired to deliver to each party whose claim was confirmed, a "certificate that he was entitled to a patent for the tract of land "designated. This certificate was to be presented to the survey- "or general, who proceeded to have the survey made and re "turned, with the certificate, to the recorder of land titles, whose "duty it was to issue a patent certificate, which, being transmit- "ted to the secretary of the treasury, (then the head of the land "department) entitled the party to a patent. By the act of April "25, 1812, the duty of the secretary of the treasury was trans- "ferred to the commissioner of the general land office. The act "of April 18, 1814, required that accurate surveys should be "made, according to the description in the certificate of confir- "mation, and that proper returns should be made to the commis- "sioner, of the certificate and survey, and of all such other evi- "dence as the commissioner might require. The court said: "'These acts show that the surveys and proceedings must be, in "regard to their correctness, within the jurisdictions of the com- "missioner; and such has been the practice. Of necessity he must "have power to adjudge the question of accuracy preliminary to "the issue of a patent.'"

* * * * * * *

"In the language of this court in the late case of *Williams* "*vs. United States, 138 U. S., 514, 524:* 'It is obvious, it is com- "mon knowledge, that in the administration of such large and

"varied interests as are entrusted to the land department, matters "not foreseen, equities not anticipated, and which are, therefore, "not provided for by express statute, may sometimes arise, and "therefore, that the secretary of the interior is given that super-"intending and supervising power which will enable him, in the "face of these unexpected contingencies, to do justice.' See also "*Lee vs. Johnson 116 U. S., 48.*"

* * * * * * *

"The same remarks apply to the powers of the secretary of the "interior, under a similarly worded section of the Revised Statue "(§463), to supervise and control the management of the bureau "of Indian affairs, which powers, so far as we are advised, have "never been questioned."

"But if there was any doubt of the existence of such power "in the secretary of the interior, as an original proposition, still "the exercise of it for so long a period—going back to the organ-"ization of that department—without question, ought to be con-"sidered as conclusive as to the existence of the power. *Hastings "& Dakota Railroad, vs. Whitney, 132, U. S., 357* and authorities there cited."

"We conclude, on this branch of the case, that the secretary "of the interior had ample power to set aside the Stratton survey "and order a new survey by Von Leicht; and *that his action in "such matter is unassailable in the courts in a collateral proceed-"ing.* The Von Leicht survey, therefore, must be held as a cor-"rect survey of the pueblo claim as confirmed by the circuit "court. Moreover, the method of running the shore line of the "bay of San Francisco, adopted by the Von Leicht survey, was "approved b the circuit court itself in *Tripp vs. Spring, 5 Saw-"yer, 209;* and on this point we entertain no doubt."

In the case of *Stoneroad vs. Stoneroad, 158 U. S., 240,* this court says: "The practice of the United States in dealing with "the public domain and all governmental grants of land is to "survey and issue patent. For this purpose in the proper ad-"ministrative branch of the government accurate and efficient

"machinery, accompanied with full remedial process for the cor-
"rection of error is provided."

In the case of *Michigan Land & Lumber Company (Limited) vs. Rust, 168 U. S., 593*, this language is used: "In *Tubbs vs. Wilhoit, 138 U. S., 134 and 143*, the court quoted with approval this passage from a letter of the secretary of the interior: 'There can be no doubt but that under the act of July 4, 1836, reorganizing the general land office, the commissioner has general supervision over all surveys and that authority is exercised whenever error or fraud is alleged on the part of the surveyor general.' And in *New Orleans vs. Paine, 147 U. S., 261*, the question was presented as to the power of the department to order a new survey, and on page 266, 147 U. S. and page 306, the rule was thus stated: 'If the department was not satisfied with this survey, there was no rule of law standing in the way of its ordering another. Until the matter is closed by final action, the proceedings of an officer of a department are as much open to review or reversal by himself or his successor as are any interlocutory decrees of a court open to review upon final hearing.' So, notwithstanding that a survey had been made, and that such survey indicated that the land in controversy was swamp land, and therefore passing, under the act of 1850, to the state of Michigan, it was within the power of the land department, at any time prior to the issuing of a patent, of its own motion, to order a resurvey and correct by that any mistakes in the prior survey."

E

The case of *Knight vs. United States Land Association* is authority for two propositions: *First*, the secretary of the interior had jurisdiction in the case at bar to do what he did do, that is, to issue the patent, and, *second*, that because he had jurisdiction, the legality of the patent cannot be questioned.

The case of *Railway Company vs. Butler, 159 U. S., 687*, cited by plaintiff in error and which seems to hold contrary to the doctrine above enunciated, was decided agreeably to the law of Michigan, under which law the title of the riparian owner

extends to the thread of the stream, and therefore such title covered an island between the water line of the riparian owner's land and the thread of the stream; but this law is directly contrary to the holding in the Iowa case of *Bigelow vs. Hoover*, cited *supra*. In the *Hoover* case the Michigan court would have decided that the island therein referred to belonged to the riparian owner. The Iowa court decided that it was a part of the public domain. In the said case of *Railway Company vs. Butler*, it was because the first patent covered and conveyed the island that the second patent was held to be a nullity, and, therefore, such second patent could have been assailed in a collateral proceeding. If it had been held in that case, as the Iowa supreme court held in the *Hoover* case, that the first patent did not cover the land, the second patent would have covered it, and it would have been good as against collateral assault.

F.

Under the facts in the *Hemphill* case cited *supra*, would it not have been competent under the authority of *Knight vs. United States Land Association*, for the secretary of the interior to have made a re-examination of the land originally surveyed and to have found that the so called lake bed was not such in fact, but high, dry ground, and as such, a part of the public domain? And might he not, after such finding, have disposed of it as such? And under the facts stated in the *Bigelow* and *Glenn* cases, might he not have made a like re-examination and a like finding, and on such finding, might he not have disposed of the land as a part of the public domain?

If it is possible for the original survey by mistake to show as lake bed that which is in fact high dry ground, or which is in fact an island, or to show that as river bottom which is in fact a part of the public domain, it is also possible for it by mistake to show that as a lake bottom which is in fact swamp land. The question is one of degree affecting the *quantum* of proof but not affecting the jurisdiction of the secretary of the interior. If the

secretary of the interior has the jurisdiction to find that the lake bottom, as shown by the original survey, was in fact an island or was dry upland, he has *mutatis mutandis* the jurisdiction to find that it was swamp land.

G.

The ordering and making of a survey is only an incident in the sale of public land. If the secretary of the interior has the power and authority to set aside a survey and order a new one, to the end that he may dispose of the public domain, he has the power to dispense with the second survey when the facts and circumstances are such as not to require a new survey. Doubtless in nearly all cases a new survey would be needed before conveyances could be made, in order to make the description of the land sufficiently definite and in order to determine the number of acres to be conveyed.

In this case (see transcript, page 61), the land in controversy is all in one body, being portions of sections 21, 22, 27, and 28, which said sections are in the interior of a congressional township. These sections all meet in a corner common to all. The land at their common corner is the land in controversy. An elongation or extension of the section lines which are common to sections 21 and 22, common to sections 22 and 27, common to sections 27 and 28, and common to sections 28 and 21, completes the description and determines the exact quantity of the land in each subdivision. The mistake made by the original surveyor was not in the section lines, but in the location of meander lines and in determining the character of the land beyond the meander lines. The lack of a new survey in such case is not vital and it does not affect the jurisdiction of the secretary of the interior.

H.

The second assignment of error reads thus: *The court erred in holding that the survey of the public lands of the United States, the approval of such survey by the land commissioner of the United States and the secretary of interior, and the sale of the land under*

such survey, did not fix the status of the meandered lakes and streams, except in cases of palpable mistake or fraud, beyond recall by any subsequent act of the land department. It is in its use of the words "palpable mistake" conveniently obscure. The evidence which to one secretary would show that the mistake was palpable might to another barely show that there was a mistake. Shall it be said that in such case the same state of facts would give jurisdiction to one secretary and deny it to the other?

That there was a mistake in the original survey of Owl Lake we have always contended. The allegations of our petition as to the condition of the land—*trans. page 3*—are as follows:

"That on September 28, 1850, when the said swamp land "act referred to in paragraph 1 hereof became a law, the said "lands described in paragraph 7 hereof were in fact swamp and "overflowed lands within the meaning of said act of congress, "and said land was at that time and continuously until said "Pearsons received the title to the said land, as set out in para- "graph 6 hereof, entirely unfit for cultivation without artificial "drainage by reason of the same being wet, swampy and marshy, "and largely grown up to rank grass, reeds and rushes and over- "flowed with water."

It could have availed us nothing to have alleged the bald fact that the description of the land as a lake in the original survey was a mistake and a misnomer. For the purpose of showing the swampy character of the land and the evidence on which the secretary of the interior acted when he issued the patent, I quote from transcript, page 50, as follows:

"JOHN JOHNSON on behalf of the plaintiffs testified:

"I have lived in Humboldt county forty years last spring. I "saw Owl Lake first in August, 1856. I had heard there was a "lake and went over to see it. I struck the lake a little north- "west of the south timber, and after I got as near as I could to "it—it was all grown up in rushes, grass, and weeds and every- "thing—we didn't think there was much of a lake, but we could

"see a little clear water to the southeast corner. We went around "the southeast corner and there was a strip of clear water, it "might have been thirty or forty rods from the north to the east "shore, and it might have run sixty or eighty rods west, but it "grew narrower to the west. There might have been ten or fif- "teen acres there perhaps; in part of this wild lilies grew; it was "quite low at the time I saw it; there was clear water only in "places and that was along the southeast where there was a little "beach or sand bar. Fifteen or twenty rods from the shore, the "pond lilies grew up. I do not think that there were over eight "or ten acres where there was nothing growing. I saw the lake "again in 1875 and there was not much difference; might have "been a little more water than when I first saw it. On the south- "east corner it was perhaps three or four rods down to the water's "edge."

OLE H. KORSLUND (trans. 20) says: "For twenty years I "have known what is generally termed Owl Lake; but during "the years I have known it, it has been in general character "quite similar to the swamp land known as impassable marsh to "the south and southwest thereof; that during said time there "had grown up in said so-called Owl Lake long grass, reeds, "weeds, rushes, etc., and the same has been swamp land, and as "above stated of the same general character as the swamp land to "the south and west thereof, which has been patented to the state "as swamp land. And I further depose and say that since I "have known the so-called lake, the same has at times been dry "in part, and this was true before said lake was ditched or drained."

Substantially like the testimony of Korslund and Johnson was the testimony of Willixsen, Halgrims (trans 20) French, Jones (trans. 23 and 24) A. J. Johnson, McCauley, Winne, Foster, Bartholomew (trans. 25, 26, 27) Hartwell, Thompson, Lund, Cox (trans. 46, 47 and 48) Shellenberger (trans. 53) and others.

On such evidence as the above the secretary of the interior acted and patented the land to the state of Iowa as swamp land.

When he patented this land it becomes important to ask,

Were there any interfering rights of third parties that would render the act of the secretary of the interior void?

I.

The case of *Hardin vs. Jordan, 140 U. S., 371*, holds that the title to the land between the shore line and the middle of a non-navigable, meandered lake is to be determined by the law of the state where the lake is situated; thus under the law of Michigan a riparian owner owns the bed of the lake to the center line. Under the laws of Iowa and Minnesota the title to the bed of navigable lakes is in the state, but under the law of Minnesota, the title to the bed of a non-navigable, meandered lake is in the riparian owner to the center of the lake, but under the law of Iowa the title to no part of the bed of a meandered, non-navigable lake is in the riparian owner. *Noyes vs. Collins, 92 Iowa, 566; McMannis vs. Carmichael, 3 Iowa, 1.* In this case, then, the ownership of no third party intervened when the secretary patented the land and the riparian owners did not then complain and do not now complain with respect to any riparian rights. The whole controversy was between the land department of the United States and the plaintiff and defendants in error herein. When the secretary of the interior assumed to take jurisdiction and to determine the swampy character of the land in question, the state of Iowa did not, as has been said, occupy the position of a *bona fide* purchaser who on the strength of the original survey and the recording of the plat had invested its money or altered its position. The state was simply in the same position that it was in in the year 1846 before the original survey was made. It had done nothing and given nothing that could stand in the way of correcting the original erroneous survey.

J.

Section 2 of the act entitled "An act to enable the State of Arkansas and other states to reclaim the swamp lands within their limits," approved September 28, 1850—United States Statutes at large, Volume 9, page 520—provides "that it shall be "the duty of the secretary of the interior so soon as it may be

"practicable after the passage of this act to make out accurate "lists and plats of said lands described as aforesaid and transmit "the same to the governor of the state * * * * and at the "request of the said governor cause patents to be issued to the "state therefor and on that patent the fee simple to said lands "shall vest in the state, subject to the legislature thereof."

By Section 3 of an act entitled "An act providing for the "collection of money due the state of Iowa from the government "of the United States, arising from the disposition of the swamp "lands and for selecting the swamp lands and securing the title "to the same," passed January 25, 1855, and being chapter 138 of the Laws of the Fifth General Assembly of the state of Iowa, it is provided: "That the governor is hereby authorized to "adopt such means as to him may seem expedient to provide for "the selection of the swamp lands of this state and to secure to "the state the title to the same."

Under the provision of the first of these acts the secretary of the interior is made a tribunal to determine the character of the lands claimed as swamp land under that act, and the governor of the state is designated as the authorized agent or official of of the state to demand and receive a patent from the government of the United States for the lands that are found to be swamp. In addition to the authority of the government conferred by act of congress, the act of the general assembly of the state of Iowa invested the governor with authority to adopt such means as to him might seem expedient to provide for the selection of the swamp lands of the state of Iowa and to secure to the state the title to the same.

In the case at bar the application to the department of the interior was made by the state, through its governor with the contention that the lands were in fact swamp lands and that the state claimed them as such under the act of 1850, and with the application the governor submitted proofs with respect to the character of the lands. On this application and on these proofs, a hearing was had before the department, and it was determined

that the lands inured to the state under the act of congress of September 28, 1850, and in conformity with this determination a patent was issued to the state. The state being entitled to these lands through one of two sources and having, through the authority appointed by law, asserted its right under the act of congress of 1850 before the proper tribunal and having, through the determination of that tribunal, acquired title to the land, cannot now, it seems to me, disregard that determination and assert title through other sources.

If these lands were not in fact swamp lands within the meaning of the swamp land act, the act of the department of the interior in selecting and patenting them to the state as swamp land, was erroneous; but the question of these lands, was a question of which the department of the interior had jurisdiction, and in the case made before that department, the governor, who by law was the authorized representative of the state, caused the question to be taken up and determined, and on his request the patent issued. This determination of the department of the interior has the force of an adjudication until changed or reversed by competent authority in a direct proceeding and the principle here stated is in harmony with the law as declared by this court in the case of *Rogers Locomotive Works vs. American Emigrant Company, 164 U. S., 569.*

As is well said by the supreme court of Iowa, *Reed vs. Wallace, 109 Iowa, 13*, "Whenever question arose as to the character "of land such as that in dispute, it was certainly competent for "the governor to submit the matter to the only authority that "had original jurisdiction in the matter."

It seems to me that it needs no further discussion nor citation of authorities to show that these legislative acts, both state and national, invested the governor of the state of Iowa with a general authority to secure to the state the title to its swamp lands, even though his act in so doing might draw in question another title through which the state might have claimed the land, and that he was not, when making the application to the

secretary of the interior, an intermeddler or an agent acting beyond the scope of his agency, but that he was the agent or representative of the state in the very matter in which he sought to act, having been clothed with the authority so to act by the legislature of the state, and that when appearing before the department of the interior, he truly represented the state—the only party in interest, except the defendants in error, and that when the decision was rendered the state was bound thereby.

In the proceedings before the secretary of the interior it was open to the state of Iowa to file counter affidavits or to submit other proof tending to show that the land was in fact not swamp land but lake bottom. It has been open to the state of Iowa to assail the finding of the secretary of the interior in a direct proceeding and to litigate the case on its merits. It has not done so, but has seen fit to institute this collateral proceeding, and it seems to me it cannot now prevail.

Respectfully submitted.

R. M. WRIGHT,

Of Counsel for Defendants in Error.

Supreme Court of the United States.

No. 9.—October Term, 1902.

The State of Iowa, Plaintiff in Error, vs. Edwin O. Rood et al. } In error to the Supreme Court of the State of Iowa.

[November 17, 1902.]

This was a controversy over about 800 acres of land lying in the bed of what is known as Owl Lake, in Humboldt County, Iowa. The original plaintiffs, the appellees in this case, claimed under the act of Congress of September 28, 1850, commonly known as the swamp land grant. Defendants' position was that the lands were unsurveyed lands belonging to the national government, subject to entry under the homestead and preemption laws, under which they had made entry. The State of Iowa intervened and claimed to own the land in virtue of its right of sovereignty over the beds of all lakes meandered by the general government.

The suit was original instituted by a petition in equity filed in the District Court of Humboldt County by Edwin O. Rood and others against George A. Wallace and others, founded upon allegations: (1) that the lands were conveyed to the State under the swamp land act of September 28, 1850, and thence by intermediate conveyances to the plaintiff; (2) that at the date of this act the lands were in fact swamp and overflowed lands, and continued to be, until Pearsons, plaintiffs' grantor, received the title, marshy and unfit for cultivation, without artificial drainage. That in 1884, Pearsons began to reclaim the land by ditches, building fences around it, and for several years used and occupied it for pasturage, and spent a large amount of money in draining, reclaiming it and making it fit for cultivation; (3) that defendants have taken possession, and built a cabin upon the land, and are interfering with the plaintiffs in their use and enjoyment of it.

Wherefore an injunction was prayed.

A demurrer to this bill was overruled and an answer filed in general denial of the petition.

Thereupon the State of Iowa filed a petition of intervention, alleging that the land in question was a part of the bed of Owl Lake, and did not constitute any part of the land which the United States government was authorized or empowered to sell. That the State was duly admitted into the Union in 1846, and, as a sovereign State, became the owner of all the lakes within its borders, subject to the right of the public to use the same,

and that the title to the soil was in the State. That in surveying the public lands adjoining the lake the same was meandered, and the land up to the meander lines sold by the United States to different persons, and after such survey and sale the United States had no right, title or interest in any part of the lake bed, and that the same had passed to the State upon its admission to the Union.

The petition denied that the land described was within the swamp land grant, and averred that the act of the plaintiffs and their vendors in draining the said lake and drawing off the water was unlawful.

Wherefore the State prayed a decree against both plaintiffs and defendants, quieting its title to the land, and for a writ of possession removing both parties therefrom.

Defendants Wallace and others subsequently amended their answer to the effect that the lands were unsurveyed lands, subject to entry by settlers, and that defendants had entered the lands as homesteads, built houses thereon, and occupied the same as homes. That, at the date of the swamp land act, the lands were covered by water from six to fifteen feet in depth, with well-defined shores and high banks upon the south and east sides, and navigable by ordinary steamboats. That the lands were never swampy, and never came within the meaning of the grant as swamp and overflowed lands. And that whatever rights plaintiffs might have in the land were junior and inferior to those of defendants.

Plaintiffs thereupon amended their petition by averring that since the commencement of the suit the lands had been patented to the State under the swamp land act of 1850; and answered the petition of the intervenors, alleging that by the proper officer of the government the character, quality and condition of said lands were duly adjudicated in the manner provided by law, and that the title of the United States passed through certain patents mentioned in amendments to plaintiffs' petition, and finally inured to the benefit of the plaintiffs, and that said patents have never been set aside nor cancelled.

Testimony was taken by the plaintiffs, and a decree entered dismissing the intervenors' petition, and quieting the title in this and several other cases involving the same facts, in the plaintiffs. On an appeal taken to the Supreme Court of Iowa, the judgment of the District Court was confirmed. Whereupon the State sued out a writ of error from this court.

Mr. Justice Brown delivered the opinion of the Court.

Motion is made to dismiss this case upon the ground that no Federal question is involved; or if there be such question, that there was another non-Federal question, the decision of which was sufficient to sustain the judgment, irrespective of what the decision of the Supreme Court may have been upon such Federal question.

1. From the foregoing abstract of the pleadings it will be seen that the title set up by the State rests solely upon the proposition that it became vested, upon its admission into the Union under the act of Congress of December 28, 1846, (9 Stat. 117,) with sovereignty over the beds of all lakes within its borders, by the act of the general government in meandering such lakes, and excluding from its survey of public lands all such as lay beneath their waters. This clearly does not involve the validity of any treaty or statute of the United States, or the constitutionality of any State statute or authority, so that if jurisdiction exists in this court, it must be by reason of the claim of a title, right, privilege or immunity under the Constitution, or an authority exercised under the United States, the decision of which was against such title, right, privilege or authority.

The real question then is whether the sovereignty of the State over the beds of its inland lakes rests upon some statute or provision of the Constitution, or upon general principles of the common law which long antedated the Constitution, and had their origin in rights conceded to the Crown centuries before the severance of our relations with the mother country. If the latter, then the State must look to the decisions of this court, recognizing and defining such rights and determining how far they are inherited, first, by the United States as the successor of the Crown, and second, by the several States upon their admission into the Union. This would not involve a construction of the Constitution, nor of any title derived thereunder, but a determination of the title of the Crown to lands beneath the beds of inland lakes and of the respective rights of the States and the general government as successors thereto.

In support of our jurisdiction the State relies (1) upon art. III of the treaty with France for the cession of Louisiana, (8 Stat. 200,) which merely provides that "the inhabitants of the ceded territory shall be incorporated in the Union of the United States and admitted as soon as possible, according to the principles of the Federal Constitution, to the enjoyment of all the rights, advantages and immunities of citizens of the United States;" (2) the provision of the Constitution, art. IV, sec. 3, which merely declares, with certain immaterial qualifications, that "new States may be admitted by the Congress into this Union;" and (3) upon the act of Congress of 1846, admitting the State of Iowa into the Union, with the provision that it should be admitted on an equal footing with the original States in all respects whatsoever.

None of these provisions was questioned by the Supreme Court of Iowa in its opinion, but neither of them has even a remote bearing upon the question of the title of the State to the land beneath its lakes. Indeed, the argument now made by the Attorney General, that the title of the State depends upon the construction given to this act of Congress, is quite inconsistent with his first assignment of error upon the merits, which charges

the court with error "in not holding that the beds of all the meandered lakes and streams in the State of Iowa belong to said State in trust for the public by virtue of its sovereignty, and that this right *does not depend upon any act of Congress or any grant from the United States.*" In other words, the State is put in the dilemma of insisting, for the purpose of sustaining the jurisdiction of this court, that the title of the State is dependent upon the proper construction of these three instruments, and, for the purpose of sustaining its case upon the merits, denying that the title depends upon either of them. This is an attempt to blow hot and cold upon the same question.

The mere fact that the plaintiff in error asserts title under a clause of the Constitution, or an act of Congress, is not in itself sufficient, unless there be at least a plausible foundation for such claim. A party may assert a right, title, privilege or immunity without even color for such assertion, and if that were alone sufficient to give this court jurisdiction, a vast number of cases might be brought here simply for delay or speculative advantage. (*New Orleans Waterworks Co.*, v. *Louisiana*, 185 U. S. 336.)

It is equally clear that the mere fact that an act of Congress or a patent of the United States appears in a chain of title does not constitute such a right, title or immunity as gives the Federal court jurisdiction, unless such title involves the construction of the act or the determination of the rights of the party under it. (*De Lamar's Nevada G. M. Co.* v. *Nesbitt*, 177 U.S. 523.)

The case of the *City of New Orleans* v. *Armas*, (9 Pet. 223,) is directly in point. Plaintiffs claimed a parcel of land in the city of New Orleans by incomplete title from the Spanish government, which was, however, confirmed under the laws of the United States and a patent issued therefor. The city claimed the land as a part of a quay dedicated to the city in the original plan of the town, and therefore not grantable by the king. The State court gave judgment for the plaintiffs, which was affirmed by the Supreme Court, and the city sued out a writ of error. The court held, through Chief Justice Marshall, that to sustain its jurisdiction it must be shown that the title set up by the city was protected by the treaty ceding Louisiana to the United States, (the treaty involved in this case) or by some act of Congress applicable to that title. It was held that the third article of the treaty, above quoted, did not embrace the case, and that the act of Congress admitting Louisiana into the Union, which is identical in language with the act admitting Iowa, could not be construed to give appellate jurisdiction to this court over all questions of title between citizens of Louisiana; that the case involved no principle upon which this court could take jurisdiction which would not apply to all the controversies respecting titles originating before the cession of Louisiana to the United States, and that "it would also comprehend all controversies concerning

titles in any of the new States, since they are admitted into the Union by laws expressed in similar language." The writ of error was dismissed. This case is conclusive against the existence of a Federal question in the case under consideration.

2. We are also asked to sustain the jurisdiction of this court upon the ground that the action of the government surveyors in segregating and setting apart the lake in question by meander lines from the public land, and the approval of such survey by the Commissioner of the General Land Office, was an adjudication by the government of the United States, by its duly authorized officers and agents, that the lake so segregated and set apart was the property of the State of Iowa and not a part of the public domain.

We do not so interpret the action of these officers. They undoubtedly did survey the lands adjoining this lake and meander the lake itself, but they determined nothing as to the title of the land beneath its waters—a determination which would have been wholly beyond their powers; but simply omitted those lands from the survey, and left their title to be subsequently determined either by State or Congressional action. It was obviously beyond the powers of a government surveyor, or of the Land Office, to determine the title to these lands, or to adjudicate anything whatever upon the subject.

Had the decision of the Supreme Court been adverse to the plaintiffs, who claimed title under the swamp land act, it is possible that a writ of error might have lain from this court, but we have frequently held that to sustain such writ, the decision must be adverse to a right claimed under an act of Congress, or to the exercise of an authority granted by the United States. (*Baker* v. *Baldwin, ante,* ——.)

The writ of error must be *Dismissed.*

True copy.

Test:

Clerk Supreme Court, U. S.